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OFFICIAL OPINIONS

OF

THE ATTORNEYS GENERAL

OF

THE UNITED STATES

ADVISING THE

PRESIDENT AND HEADS OF DEPARTMENTS

IN RELATION TO

THEIR OFFICIAL DUTIES

EDITED BY

JAMES A. FINCH

AND

GEORGE KEARNEY

VOLUME 28

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HON. GEORGE W. WICKERSHAM,
Of New York.

ALSO CONTAINING OPINIONS BY SOLICITOR GENERAL
HON. LLOYD W. BOWERS, of Illinois,

AND

ACTING ATTORNEYS GENERAL
HON. WADE H. ELLIS,
HON. J. A. FOWLER,
HON. WILLIAM R. HARR,
HON. WINFRED T. DENISON.

ALSO CONTAINING CITATIONS OF ACTS OF CONGRESS, THE REVISED
STATUTES, THE CONSTITUTION, TREATIES AND CONVENTIONS,
OPINIONS OF ATTORNEYS GENERAL, AN INDEX
TO SUBJECTS, AND AN INDEX-DIGEST.

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OPINIONS
OF
HON. GEORGE W. WICKERSHAM, OF
NEW YORK.

APPOINTED MARCH 5, 1909.

**TONNAGE DUTIES—PRESIDENT'S POWER TO SUSPEND
COLLECTION.**

The President has no power under any circumstances to suspend collection of the tonnage duties imposed by section 36 of the tariff act of August 5, 1909 (36 Stat. 111), in favor of vessels entering ports of the United States from the Province of Ontario or from any other foreign country.

The repeal of section 11 of the act of June 19, 1896 (24 Stat. 81), by section 36 of the act of August 5, 1907 (36 Stat. 111), abrogated the provisions concerning the President's power of suspending tonnage duties which had been transferred from section 14 of the act of June 26, 1884 (23 Stat. 57), to section 21 of the act of 1886.

Section 14 of the act of 1884, regarding suspensions of tonnage duties was not repealed by section 11 of the act of 1886, but was merged into section 21 of the latter act.

DEPARTMENT OF JUSTICE,

October 5, 1909.

SIR: I have the honor to acknowledge receipt of your letter of September 24, 1909, in which you inquire whether the President has a discretion to suspend the collection of tonnage dues under section 36 of the tariff act of August 5, 1909, on vessels entering from the Province of Ontario on and after October 5, 1909.

The stated section of the new tariff act (36 Stat. 111) is, in full:

“That a tonnage duty of two cents per ton, not to exceed in the aggregate ten cents per ton in any one year, is

2 *Tonnage Duties—Suspension of Collection—President.*

hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or Newfoundland, and a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any other foreign port, not, however, to include vessels in distress or not engaged in trade.

“This section shall not be construed to amend or repeal section twenty-seven hundred and ninety-two of the Revised Statutes as amended by section one of chapter two hundred and twelve of the laws of nineteen hundred and eight, approved May twenty-eighth, nineteen hundred and eight, or section five of the said chapter two hundred and twelve of the laws of nineteen hundred and eight, or section twenty-seven hundred and ninety-three of the Revised Statutes.

“Section forty-two hundred and thirty-two of the Revised Statutes, and sections eleven and twelve of chapter four hundred and twenty-one of the laws of eighteen hundred and eighty-six, approved June nineteenth, eighteen hundred and eighty-six, and so much of section forty-two hundred and nineteen of the Revised Statutes as conflicts with this section, are hereby repealed.

“This section shall take effect sixty days after the approval of this act.”

No power of suspending these provisions is given anywhere in the new tariff act itself; and the question will be found, upon a review of the legislative history of this subject, to depend upon the particular point whether or not the power of suspension given to the President by section 14 of the act of June 26, 1884 (23 Stat. 57), still exists.

The legislation presently important begins with section 4219 of the Revised Statutes, of which the new act of 1909 repeals only “so much * * * as conflicts with this section,” i. e., section 36 above quoted. Under said section 4219 the tonnage duties on vessels were: (1) On vessels

built within the United States but belonging wholly or in part to subjects of foreign powers, 30 cents per ton; (2) on other vessels not of the United States, 50 cents per ton; (3) on vessels not of the United States, entering in one district from another district and having on board merchandise taken in one district to be delivered in another, 50 cents per ton; (4) on foreign vessels entering in the United States from any foreign port or place, to and with which vessels of the United States are not ordinarily permitted to enter and trade, \$2 per ton. After the foregoing said section 4219 declared that "none of the duties on tonnage above mentioned shall be levied on the vessels of any foreign nation if the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nations, so far as they operate to the disadvantage of the United States, have been abolished. In addition to the tonnage duty above imposed, there shall be paid a tax, at the rate of thirty cents per ton, on vessels which shall be entered at any custom-house within the United States from any foreign port or place * * *; and any vessel any officer of which shall not be a citizen of the United States shall pay a tax of fifty cents per ton." It will be observed that the President's power of suspension under this section related only to the four classes of tonnage duties first enumerated, and did not extend to the additional and general duty of 30 cents per ton or 50 cents per ton last mentioned in the section. These last two duties were imposed unconditionally.

Section 14 of the act of June 26, 1884 (23 Stat. 57), to which reference has already been made, reads as follows:

"That in lieu of the tax on tonnage of thirty cents per ton per annum heretofore imposed by law, a duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the Sandwich Islands, or Newfoundland; and a duty of six cents per ton,

4 *Tonnage Duties—Suspension of Collection—President.*

not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any other foreign ports: *Provided*, That the President of the United States shall suspend the collection of so much of the duty herein imposed, on vessels entered from any port in the Dominion of Canada, Newfoundland, the Bahama Islands, the Bermuda Islands, the West India Islands, Mexico and Central America down to and including Aspinwall and Panama, as may be in excess of the tonnage and light-house dues, or other equivalent tax or taxes, imposed on American vessels by the government of the foreign country in which such port is situated, and shall upon the passage of this act, and from time to time thereafter as often as it may become necessary by reason of changes in the laws of the foreign countries above mentioned, indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage duty if any to be collected under such suspension. *And provided further*, That all vessels which shall have paid the tonnage tax imposed by section forty-two hundred and nineteen of the Revised Statutes for the current year, shall not be liable to the tax herein levied until the expiration of the certificate of last payment of the said tax. And sections forty-two hundred and twenty-three and forty-two hundred and twenty-four and so much of section forty-two hundred and nineteen of the Revised Statutes as conflicts with this section, are hereby repealed."

Section 11 of the act of June 19, 1886 (24 Stat. 81), declares that the preceding section 14 of the act of 1884 "be amended so as to read as follows:—"

"That in lieu of the tax on tonnage of thirty cents per ton per annum imposed prior to July first, eighteen hundred and eighty-four, a duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the

Caribbean Sea, or the Sandwich Islands, or Newfoundland; and a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any other foreign ports, not, however, to include vessels in distress or not engaged in trade: *Provided*, That the President of the United States shall suspend the collection of so much of the duty herein imposed, on vessels entered from any foreign port, as may be in excess of the tonnage and light-house dues, or other equivalent tax or taxes, imposed in said port on American vessels by the government of the foreign country in which such port is situated, and shall, upon the passage of this act, and from time to time thereafter as often as it may become necessary by reason of changes in the laws of the foreign countries above mentioned, indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage duty, if any, to be collected under such suspension: *Provided further*, That such proclamation shall exclude from the benefits of the suspension herein authorized the vessels of any foreign country in whose ports the fees or dues of any kind or nature imposed on vessels of the United States, or the import or export duties on their cargoes, are in excess of the fees, dues, or duties imposed on the vessels of the country in which such port is situated, or on the cargoes of such vessels; and sections forty-two hundred and twenty-three and forty-two hundred and twenty-four, and so much of section forty-two hundred and nineteen of the Revised Statutes as conflicts with this section, are hereby repealed."

The act of 1886, instead of extinguishing the rules of 1884, continues them with the following changes:

(1) The lower duty at the rate of 3 cents per ton is extended to vessels from any port or place on "the coast of South America bordering on the Caribbean Sea."

(2) Special exception is made in favor of vessels in distress or not engaged in trade.

(3) The President's power of suspending the collection of tonnage duty, instead of being limited as in 1884 to "vessels entered from any port in the Dominion of Canada,

6' *Tonnage Duties—Suspension of Collection—President.*

Newfoundland, the Bahama Islands, the Bermuda Islands, the West India Islands, Mexico and Central America down to and including Aspinwall and Panama," is extended to "vessels entered from any foreign port."

(4) The new and important proviso is added under which the suspension of tonnage duties is forbidden in case of vessels coming from "any foreign country in whose ports the fees or dues of any kind or nature imposed on vessels of the United States, or the import or export duties on their cargoes, are in excess of the fees, dues, or duties imposed on the vessels of the country in which such port is situated, or on the cargoes of such vessels."

The quoted section of the act of 1909 as to which your inquiry arises expressly repeals the just quoted section of the act of 1886, but repeats the provisions of the latter section down to its provisos (which concern the President's power of suspending the tonnage duties) with no substantial change except the reduction of the tonnage duties from "three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year," to "two cents per ton, not to exceed in the aggregate ten cents per ton in any one year," in the case of vessels entered "from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or Newfoundland." This list of favored countries remains the same in the act of 1909 as in the act of 1886, except in the omission of the Sandwich Islands from the list in the act of 1909 because of their annexation to the United States after 1886. It is also to be noticed that the act of 1909 expressly repeals section 12 of the act of 1886 (24 Stat. 82), which reads:

"That the President be, and hereby is, directed to cause the Governments of foreign countries which, at any of their ports, impose on American vessels a tonnage-tax or light-house dues, or other equivalent tax or taxes, or any other fees, charges, or dues, to be informed of the provisions of the preceding section, and invited to cooperate with the Government of the United States in abolishing all light-

house dues, tonnage-taxes, or other equivalent tax or taxes on, and also all other fees for official services to, the vessels of the respective nations employed in the trade between the ports of such foreign country and the ports of the United States."

Under the provisos of the quoted enactments of 1884 and 1886 the President issued a number of proclamations, of which the last was dated July 19, 1898, declaring the suspension of the collection of any of the duties imposed by said acts upon vessels entering from the ports of designated countries, among which was the Province of Ontario.

Considering the matter in the light of all the foregoing enactments, I deem it entirely clear that the President has no power to suspend collection of the tonnage duties imposed by section 36 of the tariff act of 1909, in favor of vessels entering from the Province of Ontario or from any foreign country whatsoever. As stated at the outset, such power can not be claimed to exist, in view of the express repeal of all section 11 of the act of 1886, unless the first proviso of section 14 of the act of 1884, which required suspension of the collection of tonnage duties in a certain case as to vessels from specially enumerated countries, has been revived as law through the repeal of the section of the act of 1886 which extended and modified that power of suspension. The power of suspending tonnage duties given to the President by section 4219 of the Revised Statutes did not reach to the duty of 30 cents per ton, in lieu of which the tonnage duties fixed by the acts of 1884 and 1886 were imposed, and can not extend to the tonnage duties imposed by the act of 1909, even though the provisions of the said section 4219 be still in force, except as to the general tonnage duty of 30 cents per ton. Whether any provisions of section 4219, Revised Statutes, are now in force need not be considered at this time.

The claim that the suspending power given to the President by the act of 1884 has been revived must rest upon the idea that the act of 1909, by repealing the section of 1886, which displaced the section of 1884, revived the last section. If the section of 1886 may properly be deemed to have re-

pealed the section of 1884, still the contention is met by the fact that the rule of the common law, whereunder the repeal of a repealing statute is held to revive the original act first repealed, has been altered as to the construction of Congressional enactments by section 12 of the Revised Statutes, which provides that: "Whenever an act is repealed, which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided." If, therefore, the section of 1886 could be said to have repealed the section of 1884, the result must be that the power of suspending tonnage duties under the act of 1884 no longer exists; and many courts would regard the section of 1886, which said that the section of 1884 should "be amended so as to read as follows," as a repealing act, and so dispose of the question in hand. Thus in *Goodno v. City of Oshkosh*, 31 Wis. 127, which related to a series of enactments analogous with that under discussion, Chief Justice Dixon says:

"The rule of construction enacted by statute in this State, that no act or part of an act repealed by a subsequent act of the legislature shall be deemed to be revived by the repeal of such repealing act, is well understood. (R. S., ch. 5, sec. 25, subd. 3; 1 Tay. Stats. 183, sec. 25, subd. 3.)

"In *State v. Ingersoll*, 17 Wis. 631, this court decided that where a statute provides that a certain section of a former statute shall be 'amended so as to read as follows,' etc., any provision of such section not found in the new statute is repealed. It follows very clearly from that decision, that, whatever provision of the former statute was in force after the amendment of 1868, it was so in force because of being found in the amendatory act, and that if all or substantially all of the former section continued to be the law, it was merely by reason of its having been copied into and reenacted with the amendment. The original section, as an independent and distinct statutory enactment, ceased to have any existence the very moment the amendatory act was passed and went into effect, and whatever provisions of it remained as law were such solely by virtue of being again enacted in the amendment. The

original section, as a separate statute, was as effectually repealed and obliterated from the statute book, as if the repeal had been made by direct and express words, and none of its provisions had been reenacted. Such being the operation of the act of 1868, the conclusion as to the operation of that of 1869 is not difficult. It repealed the whole of the act of 1868, as well that part which reenacted the provisions of the original section as the part which was added to those provisions. How such repeal can be severed, and said to apply only to that portion of the act of 1868 which was new, and not to affect that portion which was old or borrowed from the provisions of the previous statute, is certainly not easy to be perceived. If we are to look for the intention of the legislature in the language it employs, which is the only criterion where the language is plain, then it is not easy to see that the legislature did not intend to repeal the whole act, both that which was old and that which was new or brought in when the repealed act was passed." (pp. 129-130.)

And the same result must be reached if the section of 1886 be considered, not as a repeal of the section of 1884, but as a reiteration and reenactment of the provisions of the section of 1884 with some extension and addition. Then the repeal of the section of 1886 by the act of 1909 must be deemed to manifest the Congressional purpose to abrogate the provisions concerning the President's power of suspending tonnage duties which had been transferred by the legislature from the section of 1884 to the section of 1886, and thereafter stood as part of the law of 1886 rather than of the law of 1884, and derived their force from the later enactment. In this aspect the section of 1884, instead of being repealed by the act of 1886, was merged in the section of 1886, and the repeal of that section by the act of 1909 extinguished the merged provisions of the act of 1884. Such seems to me the true view of the matter. The section of 1886 from the time of its passage was the only statute in existence which gave to the President the power in question. The section of 1884 had gone out of existence. The law after 1886 and until the enactment of the statute of 1909 was the same as if the section of 1884 had

never existed. That result came about, not by the passage of the new statute in 1886 repealing the section of 1884, but by the enactment then of a statute reasserting it. The reason for the common-law rule concerning the effect of a repealing statute does not reach to such case.

The view just stated finds corroboration and thorough expression in two New York cases, which are exactly pertinent. In the first case, *People v. Supervisors*, 67 N. Y. 109, the court said:

“With us the amendment of a statute or part of a statute, by making the same read as prescribed by the amendatory statute, thus incorporating all that is deemed desirable to retain of the old law in the new, is not regarded as a repeal of the parts thus transferred, but from the time of the passage of the new statute, the whole force of the enactment rests upon the later statute. Although the former act remains upon the statute book and is not repealed, either expressly or by implication, it is no longer the law of the land in respect to new cases that may arise. In the case before us, the substance and body of the act of 1867 was incorporated in and made a part of the act of 1873; the latter statute was but a modification of the details for giving effect to the intention of the legislature to reimburse those who had been illegally assessed and compelled to pay taxes upon securities exempt from taxation * * *. A repeal of the later and more perfect statute, which was the only law in existence making the claims a county charge and providing for their payment, was indicative of an intention to revoke the concession that had been made, rather than of an intention to restore the first and more imperfect act. The change of purpose indicated by the repealing statute was radical, going to the subject-matter of the legislation, and was not limited to the more specific details and model parts of the act of 1873. The legislature may have supposed, although erroneously, that the act of 1867 was *functus officio*, not having been acted upon by the board of supervisors at its then next meeting. If so, this was a reason why that act should not be mentioned in the repealing statute. This, however, is but a slight circumstance. The broader ground upon which to

rest a decision is the fact that the statute which the legislature did in terms repeal was the only law in force at that time under which the relator and others similarly situated had any right to relief or any remedy for the taxes wrongfully imposed, and that the former act upon that subject was by incorporation merged in it and had no vitality distinct from it. So long as statutes must have effect according to the intent of the legislature as manifested by the language employed, and in the light of the circumstances under which the acts are passed, there could hardly be, without express words, a stronger manifestation of an intent to abrogate all legislation giving those who had paid taxes upon Government securities a claim upon the county for the amounts paid, than by a law in terms repealing the only statute in force which embodied the only other statute that had been passed upon the subject " (pp. 118-119).

In the second case, *People v. Wilmerding*, 136 N. Y. 363, 368, 369, Judge Peckham stated for the court as follows:

There is also another rule well established in this court which declares that a statute declaring a former statute to be thereby amended so as to read as prescribed in the amending act, is not a repeal of the original statute, and that from the time of the passage of the amendatory act such act is the only enactment on the subject as to future transactions, and the former statute is merged and lost in, and has no vitality distinct from, the amendatory act. And it has been held that a repeal of the amendatory act does not revive the original act, but both fall by virtue of the repeal of the later act. (*People v. Supervisors*, 67 N. Y. 109.) * * * It was there distinctly decided that an earlier statute which was amended and reenacted in the shape of an amendment, so as to read as prescribed in the later amendatory statute, was thereby wholly annulled as to all future cases and became merged and incorporated into the later statute. It was further held that when the statute accomplishing an amendment in this manner is itself repealed, the repealing act as effectually annihilated the earlier act which was amended as if it had been expressly mentioned in such repealing act.

“It thus appears that the enactment of the later statute of 1866 by reason of the language used in the first section thereof, did thereby incorporate into it all the life and force of the first section of the act of 1846, so that the later act stood from that time and as to all future cases as the sole and only exponent of legislative intent and power upon the subject and such act thereby utterly blotted out and annihilated the earlier statute, except as to rights or duties already existing. And when the act of 1866 was itself repealed in clear and direct language by the act of 1868, the latter act not only by repealing annihilated the act of 1866, but also the first section of the act of 1846, as if such first section had been mentioned in the repealing act. This is expressly decided by the case above cited. And it did so upon the principle that the first section of the act of 1846, by reason of its amendment of 1866, and its incorporation in that act, lost all separate existence, and must therefore stand or fall, live or die, with the act of which it had become an integral part, and if that act were repealed, such repeal could not thereby revive the first section of the act of 1846, because it had no existence and had had none since the enactment of the act of 1866.”

“In repealing the later act it is the same (so far as regards the prior act) as if such later act were the only one which had ever existed upon the subject, and the prior one could no more spring into life simply by reason of such repeal than if such prior act had never been passed.”

In the act of 1909 Congress makes no mention whatever of the act of 1884, though the section of 1886, which the act of 1909 repealed, is in express terms an amendment and restatement of the section of 1884. This undoubtedly was because Congress thought, as is quite inevitable from a strict analysis of the relationship of the two acts, that the provisions of the section of 1884 had come to form a part of the act of 1886 and rested alone for their vigor upon the enactment of 1886 and so fell with the latter act's repeal.

So much of the prior legislation as Congress wished preserved was repeated in the act of 1909. Section 36 expressly reiterates the primary provisions of the section of

1886, with only the changes of the omission of the Sandwich Islands from the list of countries having lower tonnage rates because of the annexation of those islands to the United States, and the reduction of tonnage rates for the favored list of countries from 3 cents to 2 cents per ton, and from a total annual charge of 15 cents per ton to 10 cents per ton; but, while so repeating the main provisions of the act of 1886, Congress deliberately omitted all the suspension clauses of the act. This can not have been without thought or purpose; and the purpose must have been to discontinue the power of suspension. Even if not pursuing the method of simple amendment of the act of 1886, Congress assuredly would have restated all of that act which it intended to continue, when it restated so much. And it may be added that palpable manifestation of Congressional intent ought to be found before saying that it was the Congressional purpose in the act of 1909 to give to the President the power of suspending the tonnage duties in favor of only a very limited number of foreign countries and without any reference to the relation of the general import and export duties between the foreign countries and this country—which is the nature of the suspending system in the act of 1884—though in the act of 1886 it was enlarged in favor of all foreign countries and was made dependent in each instance upon an existing parity of the general import and export duties as well as vessel charges. Instead of there being such manifestation, the very reverse appears.

It is even true that the continuation now of the President's suspending power as it existed under the act of 1884 would be in some respects incongruous with the express provisions of section 36 of the act of 1909. It was perhaps odd at the outset that the suspending power was restricted in the act of 1884 to vessels from countries enjoying the lower tonnage rates; and that peculiarity of legislation seems to have been felt by Congress, with the result that in 1886 the suspending power was widened in favor of all foreign countries. Could the narrower rule be readily supposed to have been restored by the act of 1909? Beyond that the suspending power given in the act

14 *Tonnage Duties—Suspension of Collection—President.*

of 1884 was in favor of vessels entering from "the Dominion of Canada, Newfoundland, the Bahama Islands, the Bermuda Islands, the West India Islands, Mexico, and Central America, down to and including Aspinwall and Panama," and would not reach as far even as the present group of countries enjoying the lower tonnage rates; for that group now includes "the coast of South America bordering on the Caribbean Sea," which was not in the favored list of 1884. The result, then, of holding the suspending power of 1884 now to have been revived would be that a privilege given to vessels from all the other countries now enjoying the lower rates would be denied to vessels from the northern coast of South America, though those vessels are expressly given the lower tonnage rates. Equality of treatment would be destroyed even between the specially enumerated countries whose vessels alike enjoy the lower charges.

Finally, it is not without significance that the act of 1909, beside repealing section 11 of the act of 1886, repeals also section 12 of that act which has been previously quoted. Had Congress meant to keep the suspending power in existence, the provisions of said section 12 might more naturally have been retained in the purpose still of inviting foreign countries "to cooperate with the Government of the United States in abolishing all light-house dues, tonnage taxes, or other equivalent tax or taxes on, and also all other fees for official services to, the vessels of the respective nations employed in the trade between the ports of such foreign country and the ports of the United States."

In my opinion, accordingly, the President now has no power under any circumstances to declare a suspension of tonnage duties imposed by the act of 1909 on vessels entering from the Province of Ontario or from any other foreign country.

Respectfully,

LLOYD W. BOWERS,
Solicitor-General.

Approved:

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

OFFICERS OF MARINE CORPS—AUTHORITY TO COMMAND
IN THE ARMY.

Article 122 of the Articles of War does not operate to give to officers of the Marine Corps any authority to exercise command in the Army unless they have been detached for service with the Army by order of the President and are still serving with the Army under that order.

When any part of the Marine Corps is present with the Army and engaged in a common enterprise with it, without an order of the President detaching it for service with the Army, the case is one of cooperation and not of incorporation, and in such a case no officer of the Marine Corps can exercise command over the Army any more than a naval officer can, when some part of the Navy is cooperating with the Army; and the converse is true of army officers cooperating with the Marine Corps.

The Marine Corps is a part of the naval establishment and is subject to the laws and regulations for the government of the Navy, save in the single instance when it has been "detached for service with the Army by order of the President."

DEPARTMENT OF JUSTICE,

October 6, 1909..

SIR: I have the honor to reply to your letter of September 25, 1909, in which you inquire whether Article 122 of the Articles of War "operates, *proprio vigore*, to vest authority to exercise command in the Army in an officer of the Marine Corps whose command casually encounters or serves with troops of the Army; or is it restricted in its operation to such portions of the Marine Corps as have already been detached for service on shore by the President, in the operation of sections 1619 and 1621 of the Revised Statutes?"

The stated article forms part of the general Articles of War enacted by section 1342 of the Revised Statutes, and reads:

"If, upon marches, guards, or in quarters, different corps of the Army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President, according to the nature of the case."

16 *Officers Marine Corps—Authority to Command in Army.*

The other sections of the Revised Statutes which directly bear upon your inquiry are:

“SEC. 1619. The Marine Corps shall be liable to do duty in the forts and garrisons of the United States, on the sea-coast, or any other duty on shore, as the President, at his discretion, may direct.”

“SEC. 1621. The Marine Corps shall, at all times, be subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President; and when so detached they shall be subject to the rules and articles of war prescribed for the government of the Army.”

It will be noticed that the one hundred and twenty-second article of war above quoted applies only when “different corps of the Army” happen to join or do duty together. It has no pertinency when a portion of the naval force of the United States and a part of the Army happen to join or do duty together, or when any portion of the Marine Corps happens to serve in conjunction with the Army, unless such portion of the Marine Corps can be deemed at the time a part of the Army or at least organically attached to it.

Your inquiry must therefore be answered by determining whether any portion of the Marine Corps can be deemed a “corps of the Army,” in the sense of having become a part of it for the time being, or of having been attached to the Army for the time being, through mere physical presence with the Army or service in connection with it in a common enterprise.

While the language of section 1621 of the Revised Statutes is quite decisive on this point, a more general consideration of the matter may be given to advantage at the outset. The Army and the Navy are obviously separate branches of the nation's general military establishment and are quite independent of each other except as they are subject to the common command of the President as the commander in chief of both. Their creation is authorized separately by the provisions of article 1, section 8, of the Constitution, empowering the Congress “to raise and support armies,” and also “to provide and maintain a Navy.”

They have been created largely, if not altogether, by separate enactments of Congress, and still are governed by different statutory systems. That of the Army is largely found in title 14 and that of the Navy in title 15 of the Revised Statutes. The authority of the President over the Army and Navy is exercised, in general administration, through two separate and independent executive departments. And Congress has established distinct disciplinary codes for the Army and Navy; the "Articles of War" being found in section 1342 of the Revised Statutes, and the "Articles for the government of the Navy" being found in section 1624 of the Revised Statutes.

The Marine Corps itself has a composition and primary organization distinct from those of both the Army and the Navy pursuant to chapter 9, title 15, of the Revised Statutes; but that chapter itself is a part of the title concerning the Navy; and, as we have seen, section 1621 in terms declares that the Marine Corps "shall, at all times, be subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President." This attachment usually to the Navy, but sometimes to the Army, makes the position of the Marine Corps peculiar; and the Supreme Court has recognized that fact and commented upon it as follows in *United States v. Dunn*, 120 U. S. 249, on pages 252 and 253:

"It must be conceded that the Marine Corps, a military body in the regular service of the United States, occupies something of an anomalous position, and is often spoken of in statutes which enumerate 'the Army, the Navy, and the Marine Corps,' or 'the Army and the Marine Corps,' or 'the Navy and the Marine Corps,' in a manner calculated and intended to point out that it is not identical with either the Army or the Navy. And this argument is the one very much pressed to show that service in the Marine Corps is not service in the Army or in the Navy. On the other hand, the services rendered by that corps are always of a military character, and are rendered as part of the duties to be performed by either the Army

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or the Navy. If there are services prescribed for that corps by the statutes of the United States, or the regulations of either the Army or the Navy, which are not performed in immediate connection with the Army or the Navy, and under the control of the heads of the Army or Navy, either civil or military, we have not been made aware of it. The military establishment of this country is divided by the general laws of the United States into the Army and the Navy, and over each of these one of the great heads of Departments, called Secretaries, is appointed to preside, to manage and to administer its affairs. The administrative functions of the executive are mostly under the President, distributed and allotted among the seven great Departments, at the head of each of which is a minister for that Department. Such is the theory of the distribution of executive administration established by the statutes of the United States.

“The Marine Corps is a military body designed to perform military services; and while they are not necessarily performed on board ships, their active service in time of war is chiefly in the Navy, and accompanying or aiding naval expeditions. In time of peace they are located in navy-yards mainly, although occasionally they may be used in forts and arsenals belonging more immediately to the Army. The statutes of the United States, in prescribing the duties which they may be required to perform, have not been very clear in any expression which goes to show how far these services are to be rendered under the control of the officers of the Navy or of the Army. It is clear that they may be ordered to service in either branch; but we are of opinion that, taking all these statutes and the practice of the Government together, they are a military body, primarily belonging to the Navy, and under the control of the head of the Naval Department, with liability to be ordered to service in connection with the Army, and in that case under the command of army officers.”

After referring to certain sections of chapter 9 of title 15 of the Revised Statutes relating to the Marine Corps, the court further said in the same case:

"It seems to us that these provisions of the Revised Statutes, bringing together the enactments of Congress on the subject of the Marine Corps, show that the primary position of that body in the military service is that of a part of the Navy, and its chief control is placed under the Secretary of the Navy, there being exceptions, when it may, by order of the President, or some one having proper authority, be placed more immediately, for temporary duty, with the Army, and under the command of the superior army officers" (pp. 253-254).

The Supreme Court thus states what Revised Statutes, section 1621, makes altogether clear, that the Marine Corps is a part of the Naval Establishment and is subject to the laws and regulations for the government of the Navy, save in the single case when it has been "detached for service with the Army by order of the President," and the above quotation includes a statement that the Marine Corps shall be "in that case under the command of army officers," in conformity with the declaration of section 1621 that "when so detached they shall be subject to the rules and articles of war prescribed for the government of the Army."

The statute leaves no room for doubt. The Marine Corps is stated to be "at all times" subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President. Nothing but such order by the President, or by his authority, can alter the ordinary connection of the Marine Corps with the Navy and connect that corps with the Army. On the other hand, the statute is equally explicit in saying that when such an order is made by the President the Marine Corps shall be subject to the rules and articles of war prescribed for the government of the Army, and then of course it becomes a "corps of the Army" within the scope of the one hundred and twenty-second article of war. When any part of the Marine Corps is present with the Army and engaged in a common enterprise with it, without an order of the President detaching it for service with the Army, the case is one of cooperation but not of incorporation; and then no officer of the

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Marine Corps can exercise command over the Army any more than a naval officer can, when some part of the Navy is cooperating with the Army; and conversely it is true that no officer of the Army can exercise command over the Marine Corps when the Army and the Marine Corps are merely cooperating, without the Marine Corps having been attached to the Army by an order of the President, any more than an army officer can exercise command over the Navy under like circumstances. Indeed, this case of some part of the Marine Corps and some part of the Army being together engaged in a common enterprise is but a special instance of the many cases in which the Army and Navy cooperate to a common end. It becomes different only when some portion of the Marine Corps has been attached to the Army by the President's order.

In giving an opinion upon the question whether orders from the President to the Marine Corps should pass through the Secretary of War or the Navy, Attorney-General Wirt used this language:

“No case occurs to me in which the President's orders to the Marine Corps could regularly pass through any other channel than the Department of the Navy, except one; and that is, where the President should, by an order, incorporate it with an army for any given service on land. In such case, its identity as a marine corps being, *pro hac vice*, lost in that of the Army, and the whole body being for the time one, the Commander in Chief might, I presume, with propriety pass his orders to the whole body through the Department of War. But in all other situations, whether at sea or on shore, I should consider the Navy Department the proper medium for the transmission of the President's orders to the Marine Corps, and the orders of the Secretary of the Navy to that corps as being clothed with all the authority of the President.” (1 Op. 380, 382.)

As already suggested, the question when an officer of the Army can command marines is the same as the question when an officer of the marines can command any part of the Army; and the opinion of Attorney-General Wirt therefore is much in point upon the present inquiry.

You are advised therefore that the one hundred and twenty-second article of war does not operate to give to officers of the Marine Corps any authority to exercise command in the Army unless they have been detached for service with the Army by order of the President and are still serving with the Army under that order.

Respectfully,

LLOYD W. BOWERS,
Solicitor-General.

Approved:

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

TONNAGE DUTIES—REFUND.

All charges improperly or excessively imposed and erroneously or illegally collected on foreign-built yachts, pleasure boats, and vessels not used or intended to be used for trade, under section 37 of the act of August 5, 1909 (36 Stat. 112), may be refunded under the provisions of section 26 of the act of June 26, 1884 (23 Stat. 59).

Section 26 of the act of June 26, 1884, in regard to remission of fines penalties, and forfeitures, and section 3 of the act of July 5, 1884 (23 Stat. 119), imposing upon the Commissioner of Navigation the supervision of the laws relating to the admeasurement of vessels and the interpretation of all questions relating to the collection of tonnage taxes and the refund of such taxes, are still in force.

Should the provision of section 37 of the act of August 5, 1909, imposing a duty of \$7 per gross ton on the vessels therein named, be declared invalid, such duty would be an improper or illegal charge within the meaning of the acts of June 26, 1884, and July 5, 1884, and if collected, should be refunded.

DEPARTMENT OF JUSTICE,

October 15, 1909.

SIR: I have the honor to acknowledge receipt of your letter of the 7th instant, in which you inquire:

1. Should protests against the payment of the tax of \$7 per gross ton imposed upon the use of foreign-built yachts, pleasure boats and vessels not used or intended to be used

for trade, by section 37 of the tariff act of 1909, be now received with a view to refund the same if illegally imposed and collected?

2. In the event that a yacht has been incorrectly measured and the tax of \$7 per ton collected on a greater gross tonnage than is found to be correct by the Commissioner of Navigation, can the excess be refunded in the manner that illegal tonnage taxes are refunded?

3. In the event of a decision by the courts that so much of section 37 as imposes a tax of \$7 per gross ton is unconstitutional, should a refund of the amount collected be authorized?

The paragraph in question of section 37 of the tariff act of 1909 (36 Stat. 112) reads as follows:

“There shall be levied and collected annually on the first day of September by the collector of customs of the district nearest the residence of the managing owner, upon the use of every foreign-built yacht, pleasure boat or vessel, not used or intended to be used for trade, now or hereafter owned or chartered for more than six months by any citizen or citizens of the United States, a sum equivalent to a tonnage tax of seven dollars per gross ton.”

Section 26 of the act of June 26, 1884 (23 Stat. 59), provides:

“That whenever any fine, penalty, forfeiture, exaction, or charge arising under the laws relating to vessels or seamen has been paid to any collector of customs or consular officer, and application has been made within one year from such payment for the refunding or remission of the same, the Secretary of the Treasury, if on investigation he finds that such fine, penalty, forfeiture, exaction, or charge was illegally, improperly, or excessively imposed, shall have the power, either before or after the same has been covered into the Treasury, to refund so much of such fine, penalty, forfeiture, exaction, or charge as he may think proper, from any moneys in the Treasury not otherwise appropriated.”

By section 3 of the act of July 5, 1884 (23 Stat. 119), the Commissioner of Navigation was charged with the supervision of the laws relating to the admeasurement of vessels, and it was further provided that as to all questions

of interpretation growing out of the execution of the laws relating to the collection of tonnage taxes and the refund of such taxes when collected erroneously or illegally his decision should be final.

By section 10 of the act of February 14, 1903 (32 Stat. 829), the duties, power, authority and jurisdiction imposed or conferred upon the Secretary of the Treasury by acts of Congress relating to merchant vessels or yachts, their measurement, tonnage tax imposed upon them, the remission or refund of fines, penalties, forfeitures, exactions or charges incurred for violation of any provision of law relating to vessels or seamen, etc., was transferred to and imposed and conferred upon the Secretary of Commerce and Labor.

Section 41 of the tariff act of 1909 (36 Stat. 118), contains the general provision that "All acts and parts of acts inconsistent with the provisions of this act, are hereby repealed," and nowhere does said tariff act by specific terms repeal the above-mentioned acts relating to the refund of fines, exactions, etc., illegally, improperly or excessively imposed and collected. It is obvious that there is no inconsistency between a statute which fixes the amount of charges for the use of a vessel, and prior statutes which provide for the refund of an illegal charge or an overcharge thereon.

It follows, therefore, that section 26 of the act of June 26, 1884, and section 3 of the act of July 5, 1884, are still in force as to charges on vessels of the character mentioned in section 37 of the tariff act of 1909, and that all charges improperly or excessively imposed and erroneously or illegally collected may be refunded, and for that purpose all steps may be taken which are required by said statutes.

It is equally clear that should the statute imposing a duty of \$7 per gross ton upon such vessels be declared invalid, such duty would be an improper charge, and if collected, would be an erroneous or illegal collection within the meaning of said acts, and should be refunded.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF COMMERCE AND LABOR.

HOMICIDE COMMITTED ON HOSPITAL SHIP STATIONED AT
OLONGAPO, P. I.—JURISDICTION.

A homicide committed on board of the hospital ship *Relief* while stationed at Olongapo, P. I., by the acting master of the vessel, who committed this act by order of the commanding officer of the ship, occurred "out of the jurisdiction of any particular State or district," within the meaning of section 730, Revised Statutes, and the parties accused may be tried in any judicial district either in a State or a Territory of the United States into which they shall be first brought.

The word "district," as used in section 730, Revised Statutes, includes every Territory within which there are courts regularly organized and having jurisdiction over offenses against the United States; that is, such courts as are mentioned in section 1910, Revised Statutes.

The courts of the Philippine Islands are not vested with jurisdiction in cases arising under the Constitution and laws of the United States, as prescribed by section 1910, Revised Statutes.

DEPARTMENT OF JUSTICE,

October 20, 1909.

SIR: I have the honor to acknowledge the receipt of your communication of the 11th instant, in which the material facts stated are as follows:

The *Relief* is a United States vessel, regularly placed in the naval service as a hospital ship and stationed at the naval station of Olongapo, P. I. On September 24, 1909, Asst. Surg. G. B. Tribble, the commanding officer of the *Relief*, ordered Heinke, the acting master, to arrest, alive or dead, Ransom, a fireman, who was drunk and threatening to kill anyone who might approach him. In the attempt to make the arrest, Tribble being present, Heinke shot and killed Ransom.

You ask my opinion as to what course should be pursued in order that it may be determined by the proper tribunal whether Tribble and Heinke, or either of them, is guilty of murder or manslaughter, or the killing was a justifiable homicide.

Rear-Admiral Harber, who is in charge of the station at Olongapo, and who transmitted to you the information, with reference to the homicide, assumes that article 6 for the government of the navy (Revised Statutes, sec. 1624, art. 6) has no application. This article reads as follows:

"If any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by court-martial and punished with death."

It does not appear upon what grounds the assumption that this article does not apply rests. But since there is reasonable doubt as to the applicability of this article to the offense charged, such doubt should be resolved against a trial before a court-martial, inasmuch as a court-martial is a special court of limited jurisdiction, and—

"To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; *that it had jurisdiction*; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law." (*Runkle v. United States*, 122 U. S. 543, 556; 12 U. S. 556.)

Furthermore, said article does not undertake to vest exclusive jurisdiction of the offense of murder, when committed as described therein, in a court-martial. In construing an article in the Army Regulations containing much stronger language than that here used, the Supreme Court of the United States said:

"With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention (to confer exclusive jurisdiction upon a court-martial) should be ascribed to Congress in the absence of clear and direct language to that effect." (*Coleman v. Tennessee*, 97 U. S. 509, 514.)

The general rule is that the jurisdiction of civil courts is concurrent as to offenses triable before courts-martial. (6 Op. A. G. 413; *United States v. Clark*, 31 Fed. 710.)

From the facts stated, if the homicide was not justifiable, it was clearly an offense against the United States, and cognizable in the United States courts. In section 5339, Revised Statutes, and the second clause thereof, it is provided that every person who commits murder—

"upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty

and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State," shall suffer death; and in section 5341 it is declared that any person slaying another in any one of such places, without malice, is guilty of manslaughter. This homicide occurred upon a water within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, and consequently falls precisely within the terms of the statute.

The district in which the accused should be arraigned for trial must be determined by a proper construction of section 730, Revised Statutes, which reads as follows:

"The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."

The words "or district" did not appear in the act of April 30, 1790, with which this provision originated, but, notwithstanding this fact, Chief Justice Marshall, speaking for the court in *Ex parte Bollman*, 4 Cranch, 75, 135, held that this section did not apply to offenses committed outside of a State but within Territories of the United States having regularly established courts competent to try those offenses. It was probably as a result of this opinion that in the act of March 3, 1825, and in section 730, Revised Statutes, the words "or district" were added after "State."

In *Jones v. United States*, 137 U. S. 202, 212, the Supreme Court of the United States, in considering this section and section 5339, Revised Statutes, used the following language:

"Both these acts of Congress clearly include murder committed on any land within the exclusive jurisdiction of the United States and not within any *judicial district*, as well as murder committed on the high seas."

Thus showing that the word "district" in this act means judicial districts as established by Congress.

However, in view of the construction given the statute in *Ex parte Bollman*, I am of the opinion that the word "district," as here used, includes every territory within which there are courts regularly organized and having

jurisdiction over offenses against the United States; such courts as are mentioned in section 1910, Revised Statutes, wherein it is provided that—

“Each of the district courts in the Territories mentioned in the preceding section shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States.”

But the courts of the Philippine Islands are not vested with any such jurisdiction. In the first section of the act of July 1, 1902 (32 Stat. 691), which is entitled “An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands,” it is provided that—

“The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.”

Said section 1891 reads:

“The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.”

Furthermore, it is now well settled that the Constitution and laws of the United States did not of their own force extend to the Philippine Islands. (*Dorr v. United States*, 195 U. S. 138.) Since, therefore, the general laws of the United States are not in force in the Philippine Islands, there is no necessity for courts there to be vested with power to enforce them, and in fact no attempt has been made to confer upon their courts any such jurisdiction. Under their scheme of government they have a very complete system of courts (act No. 136, Ph. Com., vol. 1, pp. 252-269; 32 Stat. 691), but their criminal jurisdiction extends only to the trial of offenses against the Philippine government.

Therefore, the homicide in question, having occurred “out of the jurisdiction of any particular State or district,” the parties accused may be tried in any judicial district either in a State or a Territory of the United States into

which they shall be first brought. It should therefore be first determined in which district the trial can be had most expeditiously and with the greatest convenience and least expense to all persons concerned, including the Government, and the accused persons and the witnesses to the killing should be sent to that place, the accused delivered to the United States marshal of such district, and the witnesses to the act placed at the disposal of the United States Attorney for the same district.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

OFFICIAL BONDS—RATE OF PREMIUM—GUARANTEE COMPANIES.

The act of August 5, 1909 (36 Stat. 125), regulating the rate of premium to be paid on official bonds does not apply to bonds voluntarily given by an employee or officer of the United States to a superior officer, and consequently it does not apply to bonds given by deputy collectors of internal revenue to collectors.

The act of August 5, 1909, does apply to bonds running to the United States and which are accepted in each case by the properly designated officer of the United States.

Voluntary bonds of the character above described do not come within the purview of the act of August 13, 1894 (28 Stat. 279), which prescribes the character and qualification of guarantee companies which may be accepted on official bonds required by law.

The rate of premium paid by the incumbent of any particular office during 1908 on his official bond may be used as the base for computing the rate which shall be paid upon the bond of the incumbent of the same office under the act of August 5, 1909, provided such rate did not constitute an isolated instance of an unusual or extortionate premium.

DEPARTMENT OF JUSTICE,

October 28, 1909.

SIR: I have the honor to acknowledge receipt of your letter of the 4th instant, replying to the letter of this department of the 27th ultimo and inquiring further as to the proper construction to be placed upon the acts of August 5, 1909, and August 13, 1894.

NOTE.—Opinion of October 27, 1909, to the President, may appear in a later volume.

The questions contained in your letter may be grouped under three heads:

First. Referring to the letter of this department of the 27th ultimo (27 Op. 624), in which it was held that the act of August 5, 1909 (36 Stat. 125), as to the rate of premium to be paid does not apply to the bond of an acting or deputy disbursing clerk selected under the act of March 4, 1909 (35 Stat. 1027), said bond not running to the United States but to the chief disbursing officer, you state:

“There are about 1,200 deputy collectors of internal revenue as well as a large number of other ‘officers and employees’ under this department from whom bonds are required by law, but which do not run directly to the United States, who would be deprived of the benefit of the rate law if this construction should control.

* * * * *

“The clause, ‘any officer or employee of the United States,’ contained in the act of August 5, 1909, defining its scope, has been construed by this department as including all bonds voluntarily given by officers or employees to their superiors as well as bonds required by law but not running directly to the United States * * *.”

You therefore inquire “whether your conclusion that the act of August 5, 1909, does not apply to the bonds of acting or deputy disbursing officers bonded under the act of March 4, 1909, is intended to apply to officers and employees under this department required by law to give bonds which do not run directly to the United States?”

The act of August 5, 1909 (36 Stat. 125), provides:

“Until otherwise provided by law no bond shall be accepted from any surety or bonding company for any officer or employee of the United States which shall cost more than thirty-five per centum in excess of the rate of premium charged for a like bond during the calendar year nineteen hundred and eight: *Provided*, That hereafter the United States shall not pay any part of the premium or other cost of furnishing a bond required by law or otherwise of any officer or employee of the United States.”

Construing this act this department held in its letter of September 27, 1909, above referred to, that it did not apply to the bond of an acting or deputy disbursing clerk selected under the act of March 4, 1909. It is to be observed that prior to the act of March 4, 1909, there had been no provision for the giving of a bond by an acting disbursing clerk and, therefore, there was no rate for the year 1908 which could be used as a basis for computing the rate in that particular case.

The act relating to the giving of bonds by deputy collectors of internal revenue to a collector (20 Stat. 329) provides:

“That each collector of internal revenue shall be authorized to appoint, by an instrument in writing under his hand, as many deputies as he may think proper, to be compensated for their services by such allowances as shall be made by the Secretary of the Treasury, upon the recommendation of the Commissioner of Internal Revenue. Allowances shall also be made in like manner for salary and office expenses of collectors, all of which shall be in lieu of the salary and commissions heretofore provided by law: *Provided, however,* That the salaries of collectors shall be fixed at two thousand dollars each per annum where the annual collections amount to twenty-five thousand dollars or less, and shall, by the Secretary, on the recommendation of the commissioner, be graduated up to the maximum limit of four thousand five hundred dollars; which latter sum shall be allowed in all cases where the collections amount to one million of dollars or upward; and *the collector shall have power to revoke the appointment of any such deputy, giving such notice thereof as the Commissioner of Internal Revenue may prescribe, and to require and accept bonds or other securities from any deputy;* and actions upon such bonds may be brought in any appropriate district or circuit court of the United States; which courts are hereby given jurisdiction of such actions concurrently with the courts of the several States. Each such deputy shall have the like authority in every respect to collect the taxes levied or assessed within the portion of the district assigned to him which is by law vested in the

collector himself; but each collector shall, in every respect, be responsible, both to the United States and to individuals, as the case may be, for all moneys collected, and for every act done or neglected to be done, by any of his deputies while acting as such."

The statute contains no provision requiring that the bonds given by deputies to their superior, and which run to the collector and not to the United States, shall be approved by the head of the department or other officer. I understand also that the custody of such bonds remains with the collector personally, and not as an officer of the United States. They are not filed as are bonds given to the United States.

Under these circumstances I am of the opinion that the act of August 5, 1909, regulating the rate of premium, does not apply to such bonds. That act applies to bonds running to the United States and which are accepted in each case by the properly designated officer of the United States.

For the same reason I am of the opinion that the act of August 5, 1909, does not apply to bonds voluntarily given by an employee or officer of the United States to a superior officer.

Second. Referring to the act of August 13, 1894, and to the communication of this department of September 27, above referred to, you state:

"In reply to the further inquiry of this department as to 'whether or not bonds of subordinates given to their superiors which are not required by law, or which do not run directly to the United States, may be executed by other surety companies than those certified under the act of August 13, 1894,' you state that the surety on the bonds of acting or deputy disbursing officers of the class indicated above appointed under the act of March 4, 1909, should be such as are authorized under the act of August 13, 1894, In thus confining your reply to the case of deputy or acting disbursing clerks of the executive departments, it appears that the general inquiry of this department has not been fully understood. For your information I will therefore state that the inquiry was intended to more particularly apply to the large number of subordinates in the customs,

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subtreasury, and other services under this department who give voluntary bonds to their superior officers in pursuance of no specific requirement of law.

* * * * *

“For these reasons the department would appreciate a more general ruling on the question hereinbefore propounded, namely, whether or not the bonds of subordinates given to their superiors which are not required by law or which do not run directly to the United States may be executed by other companies than those certified under the act of August 13, 1894.”

Replying to your second question it is evident that the purpose of the act of August 13, 1894, was to establish regulations which should protect the United States in regard to bonds accepted by it.

Section 1 of that act provides (28 Stat. 279):

“*Be it enacted, etc.,* That whenever any recognizance, stipulation, bond, or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under the laws of the United States, or of any State having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings: *Provided,* That such recognizance, stipulation, bond, or undertaking be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. But no officer or person having the approval of any bond shall exact that it shall be furnished by a guarantee company or by any particular guarantee company.”

The proviso in the first section requires that the bond be approved by the head of department “required to approve or accept the same.” On the other hand, the voluntary

bonds to which you refer are not given pursuant to any specific statute, but are the result of the mutual agreements reached between various subordinates and their superior officers. Such bonds do not have to be approved or accepted by the head of a department, nor is there any officer required by statute to approve or accept the same. Accordingly they do not come within the purview of the act of August 13, 1894.

Third. Referring to the letter of this department of September 14, 1909 (27 Op. 598), addressed to the Secretary of the Interior, and construing the term "like bond" used in the act of August 5, 1909, you state:

"This department has not selected any one certain charge as the base of computing the rate on any class, but has used the rate paid in 1908 by the incumbent of a particular office as the base for computing the rate to be paid for a like bond for the incumbent of the same office during the year 1909. To follow any other course would contemplate first a classification, and second, the ascertaining of an average rate on the class. If the average rate on the class should be computed for each company separately, the department would be confronted with the additional difficulty of having certain companies which executed no bonds during 1908 in a given class.

"In the light of the foregoing, will you please advise me if the Secretary of the Treasury is authorized under the law to compute an average rate upon bonds as classes, to be paid to the various bonding companies, and, if so, whether such classification should be based upon the general character of duties performed, or upon a correct measure of liability wherein the loss experience of the companies is given proper weight. Should you decide that this duty is not imposed upon the Secretary of the Treasury by the present law, will you please advise me whether the present practice of the department is correct, of using the rate paid by the incumbent of any particular office during 1905, as the base for computing the rate which shall be paid upon the bond of the incumbent of the same office under the act of August 5, 1909."

In its letter to the Secretary of the Interior under date of September 14, 1909 (27 Op. 601), referring to the term "like bond" this department said:

"What is evidently intended is that the charge for any bond shall not be more than 35 per cent above the rate paid last year on any bond belonging to the same general class, provided, of course, that the charge paid last year did not constitute some isolated instance of an unusual or extortionate premium. In other words, the departments in giving effect to this statute are authorized to accept any bond the charge for which is not more than 35 per cent above that exacted in 1908 for other bonds of like character, and, in determining what the charge was last year for other bonds of like character, they may exclude any premium which was so high as to be outside the range of the usual or customary charge, and include any charge, even though it be the highest paid, if it be not so high as to fall within the inhibition above stated."

This holding does not preclude your department from "using the rate paid by the incumbent of any particular office during 1908, as the base for computing the rate which shall be paid upon the bond of the incumbent of the same office under the act of August 5, 1909," provided the rate paid by the incumbent during 1908 did not constitute an "isolated instance of an unusual or extortionate premium."

Respectfully,

WADE H. ELLIS,

Assistant to the Attorney-General.

Approved:

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

BONDS OF SURETY COMPANIES—PROCESS AGENTS.

The Treasury Department should not accept the bond of a surety company in a State where the company is forbidden by the laws of the State to do business, notwithstanding the company may have complied with the provisions of section 2 of the act of August 13, 1894. (28 Stat. 279.)

The act of August 13, 1894, requires the appointment of a process agent in the district where the principal resides and also in the district where the contract is to be performed.

DEPARTMENT OF JUSTICE,
October 28, 1909.

SIR: I have the honor to acknowledge receipt of your letter of the 16th ultimo in which you request my opinion "as to whether or not a company authorized to transact a surety business under the act of Congress of August 13, 1894, which has complied with the provisions of section 2 of that act, may properly be accepted as surety on a bond given to the United States executed by a principal residing in a State wherein said company has not been licensed to do a surety business under the laws of said State."

You state that the question has arisen by reason of the following communication received by you from the insurance commissioner of the State of Washington:

"In looking over your circular, form No. 356, division of appointments, revised to August 1, 1909, in reference to companies organized to be accepted as sureties on federal bonds, I note among the list several companies not authorized to do business in the State of Washington, which you have listed as acceptable in either the eastern or western divisions of this State, and which according to your circular have appointed process agents. The companies referred to, and which are not authorized to do business in the State of Washington, are as follows: Pacific Surety Company of California; Illinois Surety Company, Chicago; Federal Union Surety Company, Indianapolis; Peoples Surety Company of Brooklyn; United States Surety Guarantee Company of New York; Bankers Surety Company of Cleveland; and Citizens Trust and Guaranty Company of West Virginia.

"As the companies above named have not complied with the laws of this State governing companies of this kind, it would be unlawful for them to issue, or for any party to accept from them, indemnity bonds of any kind."

The requirements imposed by the act of Congress of August 13, 1894 (28 Stat. 279) are as follows:

"SEC. 2. That no such company shall do business under the provisions of this act beyond the limits of the State or Territory under whose laws it was incorporated in which its principal office is located nor beyond the limits of the

District of Columbia, when such company was incorporated under its laws or the laws of the United States and its principal office is located in said District, until it shall by written power of attorney appoint some person residing within the jurisdiction of the court for the judicial district wherein such suretyship is to be undertaken, who shall be a citizen of the State, Territory, or District of Columbia, wherein such court is held, as its agent, upon whom may be served all lawful process against such company, and who shall be authorized to enter an appearance in its behalf. A copy of such power of attorney, duly certified and authenticated, shall be filed with the clerk of the district court of the United States for such district at each place where a term of such court is or may be held, which copy, or a certified copy thereof, shall be legal evidence in all controversies arising under this act. If any such agent shall be removed, resign, or die, become insane, or otherwise incapable of acting, it shall be the duty of such company to appoint another agent in his place as hereinbefore prescribed, and until such appointment shall have been made, or during the absence of any agent of such company from such district, service of process may be upon the clerk of the court wherein such suit is brought, with like effect as upon an agent appointed by the company. The officer executing such process upon such clerk shall immediately transmit a copy thereof by mail to the company, and state such fact in his return. A judgment, decree, or order of the court entered or made after service of process as aforesaid shall be as valid and binding on such company as if served with process in said district.

“SEC. 3. That every company before transacting any business under this act shall deposit with the Attorney-General of the United States a copy of its charter or articles of incorporation, and a statement signed and sworn to by its president and secretary showing its assets and liabilities. If the said Attorney-General shall be satisfied that such company has authority under its charter to do the business provided for in this act, and that it has a paid up capital of not less than two hundred and fifty thousand dollars, in cash or its equivalent, and is able to keep and perform its

contracts, he shall grant authority in writing to such company to do business under this act."

The conditions under which surety companies incorporated outside the State of Washington may do business within that State are prescribed in sections 3254, 3255, and 3259, Pierce's Washington Code, 1905, which provide that a copy of the articles of incorporation, duly certified, together with a certificate showing net assets of not less than \$350,000, shall be filed with the insurance commissioner of the State of Washington. (Sec. 3254.) When the corporation has complied with all the provisions of the act and the insurance commissioner is satisfied that the corporation has net assets or paid up and unimpaired capital of not less than \$350,000, he is directed to issue to the surety company a certificate of authority to transact business in the State. (Sec. 3255.) Every surety company incorporated outside the State is directed to appoint a process agent who shall reside within the State. (Sec. 3259.)

Section 3256 makes it unlawful for a company to do a surety business without complying with the provisions of the act, and section 3257 imposes a penalty. These sections provide:

"SEC. 3256. It shall be unlawful for any corporation to transact business as a surety corporation in this State, unless the corporation shall have complied with all the provisions of this act, and shall have obtained a certificate of authority from the insurance commissioner as herein provided.

"SEC. 3257. Penalty: If any such surety corporation, its agent, or attorney shall do business as such in this State without having complied with the provisions of this act, said corporation, its agents or attorneys, so doing business shall be guilty of a misdemeanor and shall be subject to a fine of not less than \$100 or more than \$500."

I may call your attention to the fact that the question, as stated by you, is whether a bond may be accepted which has been executed by "*a principal residing in a State wherein said company has not been licensed to do a surety business under the laws of said State,*" whereas the provisions of section 2 of the act of August 13, 1894, quoted

above, and to which you refer, require the appointment of a process agent in the judicial district *where the suretyship is to be undertaken*. However, inasmuch as you state that the conditions of section 2 have been complied with, and as the real purpose of your inquiry is to ascertain whether those are the only conditions which you should consider, and whether you may disregard the requirements of the State of Washington, I shall proceed upon the assumption that the question upon which you request my opinion is whether a company which has complied with the provisions of that section may properly be accepted as surety on a bond given to the United States, although the company has not been licensed to do a surety business under the laws of the State where the suretyship is to be undertaken.

It is to be observed that your question is in regard to the practice which should be adopted by your department in the future in the acceptance or rejection of bonds and does not have reference to any concrete case. In other words, the question before me is not to determine whether or not a particular bond, accepted by your department from a company which has undertaken a suretyship in a State in which it is not authorized by the laws of the State to do business, is a contract which may be lawfully enforced. I am requested to construe the act of August 13, 1894 (28 Stat. 279), and to state whether the conditions imposed by that act on companies which wish to do business with the United States outside the State of their incorporation are the only conditions to be considered by your department.

Section 3255 of the code of Washington, quoted above, makes it unlawful for a foreign surety corporation to do business in the State of Washington unless it has complied with the requirements of the act; section 3257 imposes a penalty for violation. The companies referred to in the communication from the insurance commissioner of the State of Washington have not complied with the conditions imposed by the code of that State and are all companies incorporated outside of Washington.

The Supreme Court has repeatedly held that it is a matter entirely within the power of each State to prescribe the conditions under which a corporation incorporated in another State may do business within its borders. In view of these decisions it is not to be supposed that Congress intended to confer upon a surety company, foreign to the State of Washington, the power to do business in Washington with the United States in contravention of the laws of the State of Washington. Rather it is to be inferred that Congress intended to prescribe the conditions applicable to a surety company wishing to do business with the United States in a State other than its State of incorporation, subject always to the further condition that the surety company had a right, under the laws of the State, to do business therein. The conditions imposed by Congress as to surety companies doing business outside the State of incorporation safeguard the United States in States where there are no state laws on the subject; but, where there are state requirements, the statute of August 13, 1894, is supplemental to and not exclusive of the laws of the State.

Therefore it is my opinion that your department should not accept the bond of a surety company in a State in which the company is forbidden by the laws of the State to do business.

As stated above, it is not necessary for me to determine whether a bond given to the United States in violation of the laws of a State could be enforced.

You also request my opinion as to whether, under the act of August 13, 1894, "a process agent is necessary in the State where the principal resides, or in the State where the contract is to be performed or carried out, or both."

In this connection section 5 of the act referred to is in point:

"SEC. 5. That any surety company doing business under the provisions of this act may be sued in respect thereof in any court of the United States which has now or hereafter may have jurisdiction of actions or suits upon such recognition, stipulation, bond, or undertaking, in the district

in which such recognizance, stipulation, bond, or undertaking was made or guaranteed, or in the district in which the principal office of such company is located. And for the purposes of this act such recognizance, stipulation, bond, or undertaking shall be treated as made or guaranteed in the district in which the office is located, to which it is returnable, or in which it is filed, or in the district in which the principal in such recognizance, stipulation, bond, or undertaking resided when it was made or guaranteed."

Section 2 above quoted requires the appointment of a process agent in the judicial district wherein the suretyship is to be undertaken. Of this section it is said in volume 25, *Opinions of Attorneys-General*, 600: "The obvious purpose of section 2 is to bring surety companies within the jurisdiction of the court in the district *where the contract is to be performed.*"

The act of February 24, 1905 (33 Stat. 812), is primarily for the protection of material men and laborers on public works, and provides that any person who has furnished labor or materials in the construction of a public building for which payment has not been made by the contractor shall have the right to intervene in any action instituted by the United States on the bond of the contractor; and if no suit is brought by the United States for a period of six months such laborers or material men are, under certain conditions, "authorized to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution."

In the opinion referred to, the necessity of reading all these laws together is made apparent. It is pointed out that, while section 2 of the act of 1894 does not specifically enact that a "process agent" shall be appointed in the judicial district wherein the principal resides, such an appointment is necessary in order to carry out the provisions of section 5 of the same act, which authorizes suit to be brought in the district in which the principal resides.

The opinion says:

"The contention that section 5 qualifies section 28 so as to make the appointment of a process agent only in the district where the bond is returnable or filed, a compliance with the statute, is contrary to its clear purpose to require the appointment of a process agent in the district where the contract is to be performed.

"Section 5 gives the Government the option of suing in three districts, viz: (1) The district in which the principal office of the company is located; (2) the district in which the office is located where the bond is returnable or filed; and (3) the district in which the principal resided when the bond was executed. Unless the company is required to appoint an agent upon whom process can be served in the district where the principal resides, the third option would be destroyed."

I am therefore of the opinion that the act of August 13, 1894, requires the appointment of a process agent in the district where the principal resides and also in the district where the contract is to be performed.

Respectfully,

WADE H. ELLIS,

Assistant to the Attorney-General.

Approved:

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

NAVAL ACADEMY—NOMINATIONS FOR APPOINTMENT TO—
ACTUAL BONA FIDE RESIDENCE.

The words "an actual and bona fide resident of the State, congressional district, or Territory in which the vacancy will exist" employed in the act of June 29, 1906 (34 Stat. 578), providing for the nomination of midshipmen for admission to the Naval Academy, require the appointee to be "actually domiciled" in the State where he is appointed. This, however, does not necessarily mean actual physical presence. A naval officer whose home is at Athens, N. Y., but who has for some time past been stationed at Portsmouth, N. H., is a legal resident and voter in Athens, N. Y., which is also the actual bona fide residence of his minor son, notwithstanding the latter has for several years been living with his father and physically present at Portsmouth, N. H.

42 *Naval Academy—Nomination—Bona Fide Residence.*

Similarly, the minor son of an army officer stationed for the last two years at Governors Island, N. Y., who has been physically present and attending school in New York City, is not an actual bona fide resident of the State of New York, but of Virginia, which is the legal residence of his parent, unless he has become entitled to or attempted to establish an actual residence separate and apart from his father.

DEPARTMENT OF JUSTICE,
October 28, 1909.

SIR: I am in receipt of your favor of the 21st instant, in which you transmit a letter from Senator Root which states to you that he is sending to the Bureau of Navigation a recommendation for the nomination of a midshipman in the navy for admission to the Naval Academy in the year 1910, and also the recommendations for first and second alternates. Senator Root says:

"In discharging this statutory duty I have been embarrassed by a doubt as to the true meaning of the provision of the statute that the person appointed must be 'an actual and *bona fide* resident of the State.' The question is as to the meaning of the term 'actual resident.' Does it mean something different from *legal* resident? When a candidate is physically present and living in one State and is a legal resident of another State, which is the State of his actual residence?

"My nominee in chief for the appointment, Mr. Morton Loonis Ring, is the son of a pay director in the navy, and is, I am entirely satisfied, a legal resident of the village of Athens, in Greene County, in the State of New York, where his father is a legal resident and voter. The young man has, however, for several years past been physically present at Portsmouth, N. H., where his father is stationed, and he has been attending school.

"The first alternate whom I have recommended is Mr. Culver Mitcham, a son of Col. O. B. Mitcham, of the Ordnance Department of the Army. Colonel Mitcham has been for the past two years stationed at Governors Island, N. Y., and his son has been physically present and attending school in New York City. Both Colonel Mitcham and his son appear to be, however, *legal* residents of the State of Virginia.

"It is plain that if one of these young gentlemen answers the requirement of actual residence, the other does not. Whichever one does respond to that requirement, I wish to have appointed. I have been unable to find that there has been any authoritative decision of the question. I beg to suggest that the question be submitted to the Department of Justice for determination."

You transmit to me, in addition, certain documents from the files of the Bureau of Navigation which bear upon the residence of Pay Director Ring, and ask an expression of opinion in accordance with Senator Root's request.

Section 1517, Revised Statutes, provides that—

"Candidates allowed for congressional districts, for Territories, and for the District of Columbia must be actual residents of the districts or Territories, respectively, from which they are nominated."

Previous to the act of July 1, 1902 (32 Stat. 686), these congressional nominations were made only by the Representatives from the States and Delegates from the Territories, and provided by the section above quoted; but by the act of 1902, supra, and subsequent acts, Senators are permitted to nominate candidates. Thus the act of June 29, 1906 (34 Stat. 578), provides:

* * * * *

"Hereafter the Secretary of the Navy shall, as soon as possible after the first day of June of each year preceding the graduation of midshipmen in the succeeding year, notify in writing each Senator, Representative, and Delegate in Congress of any vacancy that will exist at the Naval Academy because of such graduation, or that may occur for other reasons and which he shall be entitled to fill by nomination of a candidate and one or more alternates therefor. The nomination of a candidate and alternate or alternates to fill said vacancy shall be made upon the recommendation of the Senator, Representative, or Delegate, if such recommendation is made by the fourth day of March of the year following that in which said notice in writing is given, but if it is not made by that time the Secretary of the Navy shall fill the vacancy by appointment of an actual resident of the State, congressional dis-

trict, or Territory, as the case may be, in which the vacancy will exist, who shall have been for at least two years immediately preceding the date of his appointment an actual and bona fide resident of the State, congressional district, or Territory in which the vacancy will exist * * *."

It is manifest that the main purpose of this requirement of residence is the fair distribution of these appointments among the several States, Territories, congressional districts, and the District of Columbia, and to that end, to prohibit the filling a vacancy in one by a resident of another.

But by the same section (1517 Rev. Stat.) all candidates for admission to the academy must be between the ages of 14 and 18 years, so that the question here is confined to the residence of an infant.

It is well settled that the residence of a minor son is that of his father, and that this continues even after the death of the father, until the minor acquires, in some way, another legal residence. (*Mitchell v. United States*, 21 Wall. 350, 352.) Therefore, if the father of either of the above-named nominees is a resident of the locality in which one of these vacancies occur or is about to occur, that residence is also the residence of his minor son.

The meaning of the words "an actual and bona fide residence," as used in the proviso of the paragraph of the act of Congress of July 11, 1890, making an appropriation for the expenses of the Civil Service Commission, was considered by Attorney-General Miller in 1891:

"Just what constitutes an actual bona fide residence," he said, "is not always easy of determination. That a man may have an actual bona fide residence in one place, and be bodily absent therefrom for months and even years together, is certainly true. That a Senator or Representative in Congress, or other government official, who leaves his home in one of the States to live in the District of Columbia, or in a foreign country, during his official term, and with the purpose, whenever his public employment ceases, of returning to his original home, is continuously an actual bona fide resident at that home is not doubted.

* * * * *

"In brief, what constitutes actual bona fide residence under this statute, as in other cases, is a mixed question of law and fact to be determined in each instance upon its own peculiar facts. * * *." (20 Op. 60.)

The meaning of the words "actually domiciled" as employed in the act to provide for the Thirteenth and subsequent decennial censuses, approved July 2, 1909, was recently considered by me in giving my opinion to the President upon certain questions presented to him by the Civil Service Commission arising under that act. A proviso in that act required (36 Stat. 3)—

"That hereafter all examinations of applicants for positions in the government service, from any State or Territory, shall be had in the State or Territory in which such applicant resides, and no person shall be eligible for such examination or appointment unless he or she shall have been actually domiciled in such State or Territory for at least one year previous to such examination."

I pointed out that, in my opinion, the proper interpretation of this language was that the applicant must not only show that he resides in the State or Territory where he applies for examination, but that at least for one year previous to such examination he shall have been actually domiciled there; that is to say, that he shall for that period have had his permanent home within that State or Territory, a home adopted at least one year previous to that examination, with the intention of making it his permanent abode, and which intention shall not have been departed from during that period; but that it could not be said, as a matter of law, that actual physical presence at any time within the year preceding the date of application for examination was required to demonstrate actual domicile therein; that there must, of course, have been actual physical presence at some time within the State in order to establish a residence, which presence for such purpose must have been accompanied by an intention to indefinitely reside and have one's home at that place. (27 Op. 546-559.)

In *Perrine v. Evans* (35 N. J. Law 221, 223) it was said:

"Residence is always a place of abode; it never denotes simply the place where a man is, or happens to be."

In *Perrine v. Evans* (35 N. J. Law 221, 223) Chief Justice Beasley said:

"But to contend that to be in a State signifies the same thing as to reside in a State is to raise a quarrel with all usage and every lexicon."

The words "an actual and bona fide resident of the State, congressional district, or Territory in which the vacancy will exist" employed in the statute, in my opinion, require the appointee to be "actually domiciled" in the State where he is appointed.

Senator Root states that his principal nominee is the son of Pay Director Ring, an officer of the navy, whose home is at Athens, Greene County, N. Y., but who has for some time past been stationed at Portsmouth, N. H., engaged in a detail which has required his actual presence at that point.

The papers submitted by the department indicate that, in his communications to the department, Pay Director Ring has always referred to Athens, N. Y., as his home. That did not cease to be his actual bona fide residence by reason of his absence in the public service. In this connection it is significant that the constitution of New York provides, article 2, section 3:

"For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States."

In my opinion, therefore, Pay Director Ring is a legal resident and voter in the village of Athens, Greene County, N. Y., and, therefore, the actual bona fide residence of his minor son is also at Athens; and that residence has not been lost by his physical presence at Portsmouth, N. H., where his father is stationed and where he is attending school at that point.

Applying the same reasoning to the case of Senator Root's first alternate, a son of Colonel Mitcham of the Ordnance Department of the Army, it would clearly appear that he is not an actual bona fide resident of the State of New York. Colonel Mitcham is stated to be a legal resident of the State of Virginia, but for the last two

years has been stationed at Governor's Island, N. Y., where his son was physically present, attending school. In the absence of any evidence indicating an intention on the part of Colonel Mitcham to adopt an actual residence in the State of New York, or elsewhere than his legal residence in the State of Virginia, and in the absence of any evidence that his minor son has become entitled or has attempted to exercise the right of establishing an actual residence, separate and apart from his father, I am of the opinion that he, too, is an actual and bona fide resident of the State of Virginia, within the meaning of the statute above referred to.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

CONTRACT FOR SUPPLIES—DEPARTMENTS AND INDEPENDENT ESTABLISHMENTS OF THE GOVERNMENT.

The R. P. Clarke Company is bound by the contract it entered into with the "several departments and independent establishments of the Government" to furnish to the Department of Agriculture, for the use of the Forest Service, such amount of either of the varieties of cloth described in the contract as may be ordered by said department during the fiscal year ending June 30, 1910, notwithstanding the fact that it was not estimated by the general supply committee that any such cloth would be required by that department.

What constitutes prompt delivery is a question of fact, in regard to which the Attorney-General is not required, under section 356, Revised Statutes, to express an opinion.

DEPARTMENT OF JUSTICE,
November 4, 1909.

SIR: In compliance with a request that I transmit to you my opinion upon certain questions arising under a contract for supplies entered into by the R. P. Clarke Company and the several departments and independent establishments of the Government I have the honor to say:

The principal question is, whether or not the Clarke Company is bound by their contract to furnish to the Forest Service, which is part of the Department of Agri-

culture, a quantity of a certain character of cloth ordered by it. The Clarke Company insists that it is not so bound, because in the general schedule of supplies, which was sent by the general supply committee to each prospective bidder, it was not indicated that any such cloth would be required by the Department of Agriculture. The parts of the contract which relate to this question are as follows:

The contract was entered into between the R. P. Clarke Company, of one part, and the "United States, acting by and through the proper representatives of each of the several departments and independent establishments whose names are signed hereto, each of said departments and independent establishments acting independently of the others," of the second part; and the company agreed "with the party of the second part, and with each of said departments and independent establishments separately," that it would, "at its own risk and expense, furnish and deliver promptly, in accordance with the requirements of the instructions to bidders, and upon the terms specified therein and in the advertisement relating thereto, the quantities, more or less, of supplies and services included in the general schedule of supplies, which is hereby made a part of this contract the same as if attached, at the unit price set opposite each item, respectively, and within the time specified, in accordance with the proposal of the party of the first part made in pursuance of the advertisement of the general supply committee dated February 20, 1909, inviting proposals to supply the articles mentioned in the general schedule of supplies to said departments and independent establishments during the fiscal year ending June 30, 1910, which is hereby made a part of this contract the same as if attached hereto, as follows:"

Then follows a list of the articles which the company obligated itself to supply, said list showing the number of the item in the general schedule of supplies, a description of the article, the unit and price per unit of the same. For illustration, one of the items in question is thus set forth—"Item No. 1004a-6; Article, Cloth cotton; 8-4 yards wide, A. Norwood, bleached; unit, yard; price, \$0.19." Immediately following the list of items appears

the following stipulation: "And the said party of the first part will, at its own risk and expense, furnish to either of said departments or independent establishments, at any time or times when called on to do so during the said fiscal year, such additional quantity of any of the articles designated in said general schedule of supplies as may be ordered by it, at the unit price set opposite each item, respectively; but neither of said departments or establishments is bound to order its entire quantity of supplies designated in said schedule."

As stated in the contract, the proposal was made a part thereof and was in the following form: "The undersigned hereby proposes to furnish any or all of the executive departments and independent establishments of the United States Government, as follows (then follows a list of the departments and independent establishments), with the various kinds of supplies, as hereinafter specified, and at the rate set against each item, for the fiscal year commencing on the 1st of July, 1909, and ending on the 30th of June, 1910. The right is accorded to the head of any department or independent establishment to order a greater or less quantity of any or all of the articles embraced in this proposal as the wants and exigencies of the service may require. The articles are to be of quality equal to the accepted samples, and delivered promptly in accordance with the requirements of the instructions to bidders, upon terms specified therein and in the advertisement relating thereto. The undersigned has read the specifications and instructions to bidders and agrees to comply therewith in every particular."

Inasmuch as the instructions to bidders is referred to in both the application and the body of the contract, it is proper that it be looked to in construing the same. In these instructions, with reference to the quantity of articles, it was said: "The quantities given in the accompanying schedule are the **ESTIMATED REQUIREMENTS** for the fiscal year ending June 30, 1910; but it is distinctly understood that these estimates are approximate and given for information only, and no obligation is imposed

thereby, THE RIGHT BEING RESERVED TO ORDER ANY GREATER OR LESS QUANTITY, AS THE INTERESTS OF THE GOVERNMENT MAY REQUIRE." (The capitals are in the instructions.)

These various provisions in the body of the contract and in the application signed by the company and the instructions to bidders, which were examined by the company with a view to making the application, render the meaning of the contract with reference to the point in question so clear that it will hardly admit of discussion. When this form of contract was prepared, in view of the statutes relating to the purchase of supplies by the various departments and independent establishments, it was recognized that the bidder should be required to enter into a contract with each of them separately; and the terms of the instrument signed by the Clarke Company can leave no doubt that it constitutes a separate and distinct contract between that company and each of the several departments and independent establishments by which it was executed. That is, as between the Clarke Company and the Department of Agriculture this instrument has precisely the same force and effect as if the name of no other department or establishment had appeared thereto and it had purported on its face to be a contract only between said company and said department. When thus considered, can there be the least doubt that it is a contract by which the Clarke Company binds itself to furnish the Department of Agriculture and each of the other departments and establishments mentioned therein such an amount of either or any of the articles described and at the prices mentioned therein as may be demanded by it during the fiscal year ending June 30, 1910? It is unfortunate for the Clarke Company that the prices of some of these articles have increased, but if they had decreased the Government would have been the sufferer. This is a risk that must be assumed by all parties who enter into contracts of this character. The fact that it was not estimated in the schedule of supplies that any cloth of this description would be required by the Department of Agriculture, can not alter the terms

of the contract as written and executed. As stated in the instructions to bidders, this estimate was only for information, and no obligation was imposed thereby.

I am of the opinion, therefore, that the R. P. Clarke Company is bound by its contract to furnish to the Department of Agriculture any amount of either of the varieties of cloth described in the contract as may be ordered by said department during the fiscal year ending June 30, 1910, notwithstanding the fact that it was not estimated by the general supply committee that any such cloth would be required by said department.

Other questions presented are, whether the Clarke Company failed to deliver *promptly* certain articles of cloth ordered by the Department of Agriculture, and whether that department had a right in consequence of delay in delivery to purchase such articles in the open market and charge the difference in price to the Clarke Company. The contract specifies that the delivery of articles shall be made "promptly, in accordance with the requirements of the instructions to bidders, and upon the terms specified therein and in the advertisement relating thereto," and in the instructions to bidders it was said: "Articles must be furnished promptly as ordered. On the failure of the contractor to deliver an article of the proper quality within a reasonable time after it is ordered, the right is reserved to purchase such article in open market if the exigencies of the service require it, and if a greater price than that of the contract be paid for such article, the difference in the total amount of the purchase will be charged to the contractor and sureties on the bond, and the contract may be declared forfeited." This provision speaks clearly for itself, so far as the question of law is concerned; but what constitutes a prompt delivery is a question of fact, for the determination of which, ordinarily, a number of elements must be considered. There is no evidence before me by which I could determine with any degree of certainty whether the delivery in question was unreasonably delayed; and if there were, it would not be in accord with the custom of this department for me to consider this question, as under section 356, Revised Statutes, the heads of departments

can require my opinion only upon questions of law arising in the administration of their departments, and not upon questions of fact.

Very respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

PATENTS—INFRINGEMENT—CARTRIDGE-CASE
EXTRACTOR.

A cartridge-case extractor manufactured in accordance with Letters Patent No. 625326, known as the Driggs and Tasker patent, would not be an infringement upon Letters Patent No. 599482, or Tasker patent.

Considering the specifications and first claim of the Tasker patent together, the curvature of the wall of the slot against which the face of the extractor works must be considered as an ingredient part of the combination claimed. The shape of the wall of this slot, and the removable means for normally blocking the openings into the guide-grooves mentioned in the fifteenth, sixteenth, and seventeenth claims were new ingredients and patentable, but neither of these claims is present in the Driggs-Tasker extractor.

It is elementary patent law that to constitute an infringement of a combination claim, every element of the combination must be present in the infringing patent.

DEPARTMENT OF JUSTICE,
November 8, 1909.

SIR: I have the honor to acknowledge receipt of your communication of the 18th ultimo, in which you request my opinion as to whether a cartridge-case extractor manufactured in accordance with Letters Patent No. 625326 would be an infringement upon Letters Patent No. 599482.

A proper determination of the question will require a careful consideration of the mechanism of the two extractors in question.

Letters Patent No. 599482 was issued to V. C. Tasker on February 22, 1898, and the extractor embraced in said patent and the principles upon which it is operated are illustrated in figures 1, 4, and 9 of the drawings accompanying the application therefor, which are here inserted:

FIG. 1

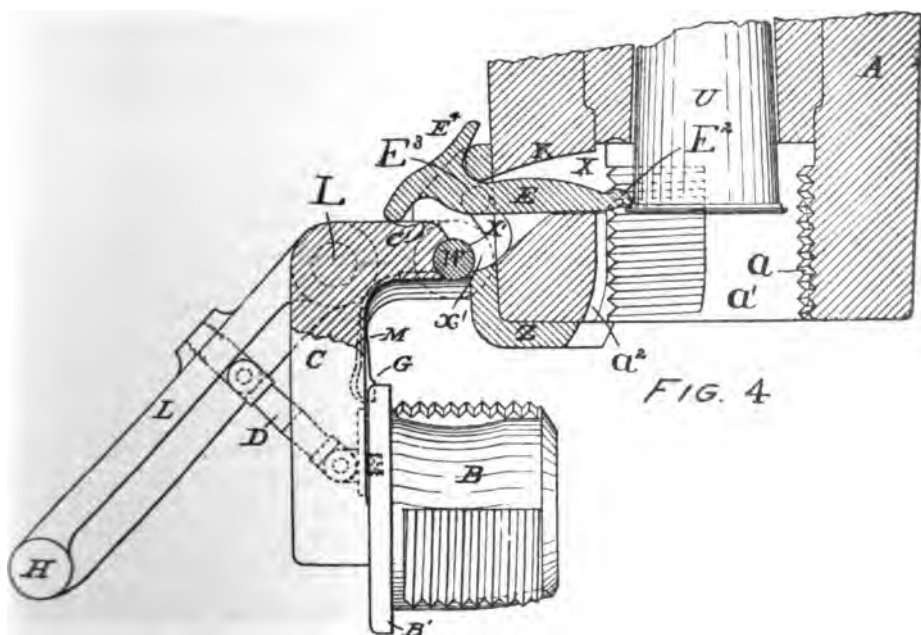
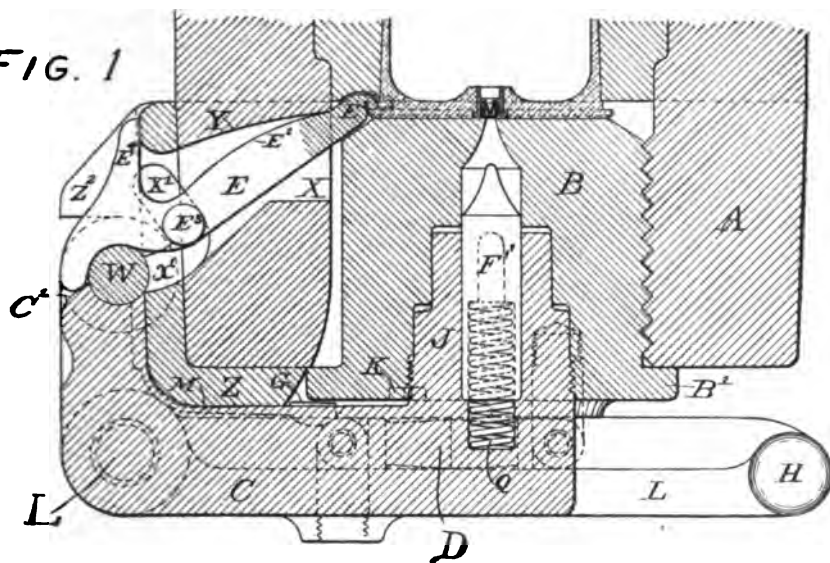


FIG. 4

FIG. 8.

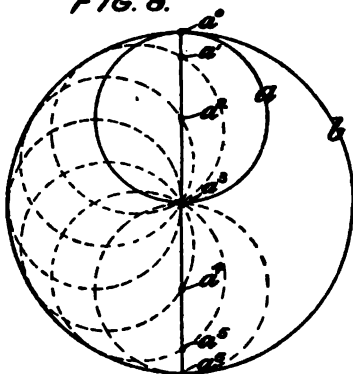


Figure 1 represents a horizontal section of the breech of the gun and of the mechanism in the closed position; figure 4 represents a similar section with the breech open, and figure 9 represents the principle of the extraction. A represents the gun, B the breechblock, which is connected with the handle H as indicated; and by means of this handle after the gun is fired the whole system is swung outward and around the pivot U. The extractor and the manner in which it is operated are thus described in the specifications:

"The cartridge-case extractor E, figs. 1, 4, and 6, is situated in a slot X through the breech-wall, said slot having a curved front surface Y, the center of curvature being approximately in a line extending rearward from the inner extremity E² of the extractor. The latter is adapted to roll on this curved surface, its front surface having a curve whose radius is about one-half that of the curved wall of the slot and is caused to engage this curved wall by a cam-surface C' on the carrier. The principle embodied is a geometrical property of the hypocycloid curve or a curve generated by any point on the periphery of a circle which rolls within the periphery of a larger circle. As is well known, in the special case in which the radius of the rolling circle is one-half that of the one on which it rolls the hypocycloid takes the form of a straight line, passing through the center of the larger circle, as illustrated in the diagram

fig. 11, in which b represents the fixed circle and a the one which rolls therein, the successive positions of the point a^0 being indicated at a^1, a^2, a^3 , etc., the corresponding positions of the rolling circle being shown in dotted lines.

"The extractor is so proportioned that the claw or nib E^3 on its inner end, which engages the head of the cartridge case, is about in line with the curved front surface, and said claw is thus constrained to move in a straight line when the extractor rolls without sliding. Sliding is prevented to any desirable extent and the extractor is retained in the slot X by a lug or lugs $E^3 E^3$ on the opposite sliding surfaces of the extractor near the outer extremity of its curved front face, freely moving in grooves X' in the gun, as shown in figs. 1 and 4. Said grooves should preferably be straight and lying radially to the center of curvature of the front of the slot in the gun, for the lugs $E^3 E^3$ being nearly in the circumference of the rolling circle they practically have the property of any point therein of moving in a line through said center. The extractor having rolled to the end of the curved surface in the gun may, if further movement is desired, pivot about its lugs in the guide-grooves in the position shown in fig. 4, the claw E^3 then moving slightly out of a straight line, but only due to the difference in direction of the arc subtending a small angle and the tangent thereto. On account of its rolling action, beginning near the cartridge-head and acting against a succession of fulcrums more and more remote therefrom, this extractor has great power to loosen the cartridge-case and a constant increment of velocity is given thereto, thus economizing the strain on the extractor and enabling it with a minimum amount of such strain and without shock to eject the cartridge-case with a low initial and a high final velocity. The extractor is provided near its outer end with a forwardly-projecting arm E^4 , lying within the slot in the gun or in cheeks Z^2 , which arm is adapted to close the space between the rolling surfaces when the mechanism is in the closed position. This is for the purpose of excluding dirt, etc., and also serves to steady and guide the extractor.

"The guide-grooves X' in the slot X are extended at their rear, as at x', figs. 1 and 4, to run out of said slot, whereby the extractor may be removed in the absence of the hinged carrier and its bolt W. When the latter are in position, however, the extractor-lugs are confined thereby to the straight or guiding part of said grooves, and the extractor cannot leave its place in the slot.

"The cheeks Z' embracing the arm E' of the extractor, also serve as stops to the carrier in its open position. They may obviously be formed of metal solid with the gun, as may also the hinge-lugs Z', and the hinge-plate Z may be dispensed with, especially in large guns, they being differently proportioned. The object is to here show the mechanism as it might be applied to a small gun already built."

Seventeen claims are made by the applicant with reference to this extractor, the first one of which is the most general in its terms and is in the following language:

"The combination of a breech-loading gun having a suitably-shaped slot cut through its wall with a cartridge-case extractor mounted in said slot and adapted to make continuous rolling contact with the front of said slot, whereby a continuously-shifting pivot is secured and means for pressing forward against the outer portion of said extractor, substantially as described."

In 12 of the claims the combination described includes by specific language a curved front face of the slot in which the extractor is mounted, and in 3 of the claims one of the combinations is a removable part of the breech-closing mechanism adapted to normally block the openings into the guide-grooves as described.

The extractor embraced in patent No. 625,326 may be understood from figs. 11, 12, 15, 17, 18, and 19 of the drawings filed with the application, and are as follows:

No. 625,326.

Patented May 23, 1899.

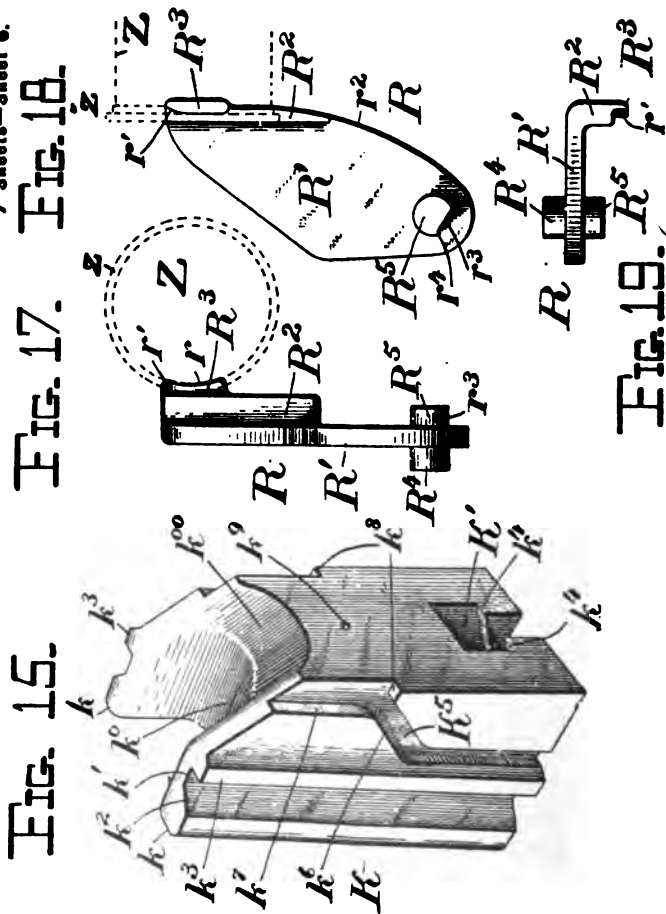
W. H. DRIGGS & V. C. TASKER.

RECOIL OPERATED GUN.

(Application filed Mar. 17, 1898.)

(No Model.)

7 Sheets—Sheet 6.



Figures 11 and 12 represent a section of the breech of the gun, the breechblock being in the open position in figure 11, while in figure 12 the block is removed from the gun. In these two figures A represents the body of the gun, while A² represents its rear termination, it being rounded outward and downward so as to admit the free passage of the projectile into the bore from the rear when the breechblock is in the open position, as shown in figure 11. K is the breechblock, which is shown in detail in figure 15. This block is made to move upward and downward in a chamber immediately to the rear of the shell when in place by means of a lever M, the end of which M² engages the upper wall of the chamber K' in the breechblock. The shell is inserted when the breechblock is in the position shown in figure 11, and the block is then raised, or rises automatically, until the firing-pin hole k^o is even with the center of the shell. The description and operation of the extractor is thus described in the specification:

"The extractors R consist of the vertical plates R', bent at right angles at R² and terminating in the engaging rib R³, which are curved, as at r, to engage in front of the rim z of the cartridge-case Z, while the backs of these ribs R³ are rounded somewhat, as at r', to form a pivot for the extractor during the operation of starting the cartridge-case to the rear after the gun has been fired. The lower portion of the extractor is provided with two oppositely-disposed lugs R⁴ and R⁵, which project into the curved recess A⁴ in the wall of the breechblock chamber and the groove K⁵ in the side of the breechblock, respectively. The lug R⁵ is flattened, as at R⁴, on the side opposite to the rib R³ to lock the breechblock in the open position, as will be hereinafter described. The lug R⁵ travels in the cam-groove K⁵ in the side of the breechblock, which cam-groove has the operating portion k^o, adapted to move the heel of the extractor forward as the breech is opened and rearward as the breech is closed, and also the large portion k', open to the front, which permits the breechblock to be withdrawn from its seat without being impeded by the

lugs of the extractors. Near the upper end of this cam portion k^6 of the groove K^5 the lower wall of this groove terminates in the flat shoulder k^8 , adapted to engage beneath the flat surface r^3 of the lug R^5 when the extractor is in the rearward position and the breechblock is in the open position. Thus as the breechblock is moved down by the rotation of the rock-shaft M the lug R^5 of the extractor is cammed forward in the groove K^5 of the breechblock, while the lug R^4 moves forward in the groove A^4 in the wall of the breechblock chamber. When the breechblock reaches the lower or open position, as indicated in Fig. 11, the lug R^5 will have passed out of the groove k^6 into the recess k^7 , and the plane face r^3 will be above and will engage the shoulder k^8 , thus preventing the breechblock from moving upward until the extractor has been moved forward far enough to release the engagement of the plane surface r^3 and the shoulder k^8 .

"The loading of the gun will automatically trip the extractor out of engagement with the shoulder k^8 , because as the cartridge-case is shoved home the rim of the cartridge-case will engage the rib R^3 and will push the extractor forward from the position shown in full lines in Fig. 12 toward that shown in dotted lines in said figure, and the breechblock will then be free to be moved upward in the closed position either by hand or by the automatic attachment that will herein be described."

The older patent will be designated the Tasker patent and the later one the Driggs and Tasker patent. It is insisted by the owners of the Tasker patent that the extractor embraced in the Driggs and Tasker patent is an infringement upon the first claim of their patent. The elements of that claim are: (1) A breech-loading gun having a suitably-shaped slot cut through its wall and an extractor mounted in said slot; (2) the adaptation of that extractor to the face of said slot so as to make a continuous rolling contact with the front of said slot, whereby a continuously shifting pivot is secured; and (3) means for pressing forward against the outer portion of said extractor.

The discussion may be confined within very narrow limits, and needs the statement of but very few principles of patent law. While the first and third elements do not appear in connection with the Driggs and Tasker extractor in the same form as with the Tasker, yet I think that they are accomplished by mechanical equivalents. An examination of the Patent Office shows that chambers for the breechblock, the mounting of the extractors in those chambers, and the application of the force to work the extractor to the end thereof away from the shell by means of the breechblock were well known ingredients at the date of the Tasker patent; and therefore the substitution of these ingredients in the last patent for the first and third elements in the former one affords no defense to the charge of infringement. (*Seymour v. Osborne*, 11 Wall. 516, 556; *Gould v. Rees*, 15 Wall. 187, 192, 193.) On the other hand, since neither of these elements contained anything new, the validity of the first claim in the Tasker patent must depend upon whether the second element therein, or the combination of all the three elements, contained anything new and useful.

If this claim be so construed that it does not embrace the curved surface of the slot against which the face of the extractor works, then I am of the opinion that neither the second element nor the combination claimed presented anything new, and that said combination was not therefore patentable. I reach this conclusion from a careful comparison of the extractor described in the Tasker patent with a British patent to Welin, No. 1329, issued in 1896, it appearing to me that every element embraced in the first claim of the Tasker patent, provided it does not embrace the curved face of the slot, is contained in the Welin patent. That the construction and operation of the two extractors may be readily compared, figures 4, 5, and 6 of the drawings of the Welin patent are reproduced below:

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From British Patent to Melia

b. Fig 4.

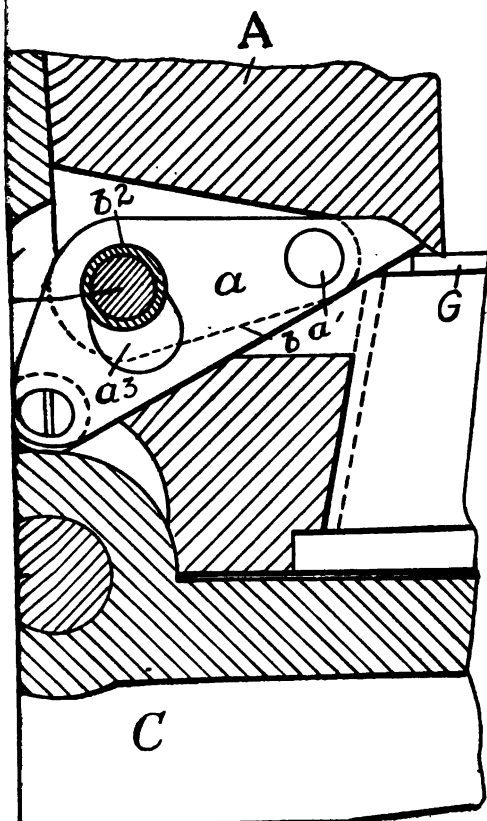
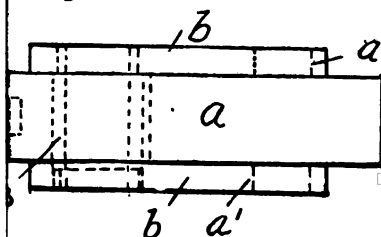


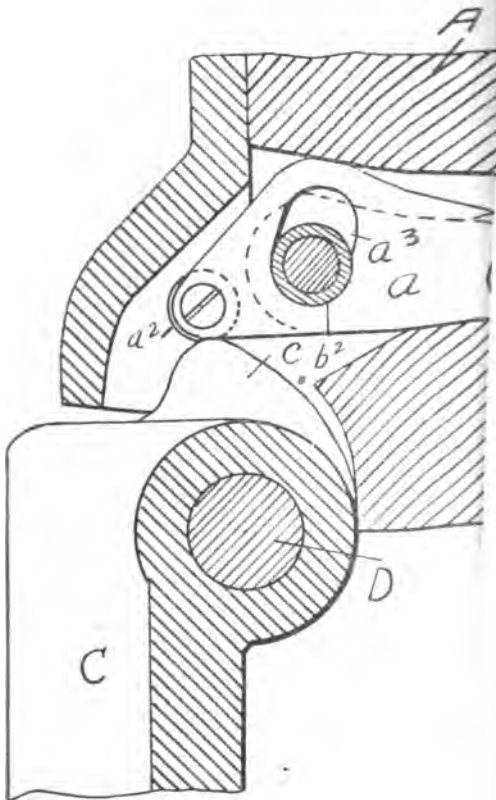
Fig-5



22096 2	ENCLOSURE 3 BUREAU OF ORDNANCE	SEP 23 1908	268 20
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Tracing from British Pat
 An 132941896.

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The extractor *a* is provided with studs *a'*, which are connected by links *b* and sleeve *b*² to the pin *b'*, which is fast to the gun. This pin and sleeve project through a slot in the extractor, and the upper end of the extractor is provided with a roller *a*², which engages the cam *c* on the breechblock carrier *C*. When the breech is closed the parts are in the position shown in figure 4. As the carrier is swung the cam *c* engages the roller *a*² and rolls the nose of the extractor along the front wall of the face of the gun with a decreasing leverage until the sleeve *b*² reaches the other end of the slot *a*³, as shown in figure 6, when the fulcrum shifts to this sleeve, causing a quick motion with a short lever arm. I am unable to see any material difference between the movements of this extractor and the objects to be accomplished by those movements and those of the Tasker patent. This extractor has the curved surface at the toe and for some distance therefrom. The movement begins with the fulcrum on this curved surface, giving thereby a long leverage and slow action. Thus a powerful force is exerted to loosen the shell which has been highly heated and expanded by the explosion within the gun. The fulcrum shifts along this curved surface until the entire flat surface of the extractor is reached, when immediately the quick action caused by the change of fulcrum is produced.

The movements of the Tasker extractor are precisely the same except the rolling motion is continued some distance further along the surface before the quick action is produced. That there is such quick action is shown by the following description in the specification of the final movement of the extractor:

"The extractor having rolled to the end of the curved surface in the gun may, if further movement is desired, pivot about its lugs in the guide-grooves in the position shown in figure 4, the claw *E*² then moving slightly out of a straight line, but only due to the difference in direction of the arc subtending a small angle and the tangent thereto."

This final action is, therefore, produced in the Welin patent by the extractor pivoting on the sleeve around the stud, which is fastened to the gun but protrudes through a slot in the extractor, and in the Tasker patent by the

extractor pivoting on the lugs which are fastened to the extractor but move in grooves in the walls of the gun. In both instances it is this action which throws the shell from the gun after it has been loosened by the great force produced in the beginning by the fulcrum of the lever being on the curved surface near the toe of the extractor.

I am further of the opinion that on account of the very narrow basis upon which the Tasker patent rests, and the indefinite meaning of the expression "suitably shaped slot cut through its wall," reference should be had to the specifications to determine what the character of the slot is which was intended to be used in connection with the extractor described, and that if a slot having a certain shape was regarded as essential to the proper operation of the extractor, the slot itself having the shape described should be regarded as an element of the combination claimed. It is well recognized that the specifications may be referred to to explain and restrict, but never to expand the claims. (*Mitchell v. Tilghman*, 19 Wall. 287; *Stirrat v. Excelsior Manufacturing Co.*, 61 Fed. 980, 984; *Adams Electric Ry. Co. v. Lindell Ry. Co.*, 77 Fed. 432, 449.)

By reference to the specifications and drawings it is seen that the curvature of the face of the slot is therein regarded as exceedingly important and, in fact, essential to the proper working of the extractor. So much is this true that figure 9 is given for no other reason than to demonstrate that a point in a curved surface moving upon another surface with one-half the curvature of the former must move in a straight line. It is, moreover, essential that the claw of the Tasker extractor move in a straight line, or one deviating but little therefrom, provided the claw engages the rim of the shell, as shown in the drawings, as otherwise it would either become released from the shell or would jam it against the opposite wall of the bore of the gun.

It appears to me, therefore, that when the specifications and this first claim are carefully considered together, the curvature of the wall of the slot against which the face of the extractor works must be considered as an ingredient of the combination claimed. From the information before

me it appears that the shape of the wall of this slot and the removable means for normally blocking the openings into the guide grooves mentioned in the fifteenth, sixteenth, and seventeenth claims were new ingredients and patentable; but neither of these elements is present in the Driggs-Tasker extractor.

It is of course elementary patent law that to constitute an infringement of a combination claim every element of the combination must be present in the infringing patent. (*Rowell v. Lindsay*, 113 U. S. 97; *Snow v. Lake Shore, etc., Ry. Co.*, 121 U. S. 617; *Wollensak v. Sargent*, 151 U. S. 221.)

I am therefore of the opinion that a cartridge-case extractor manufactured in accordance with Letters-Patent No. 625326 would not be an infringement upon Letters-Patent No. 599482.

Very respectfully,

J. A. FOWLER,
Assistant Attorney-General.

Approved:

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

RECLAMATION SERVICE—FILING OF CONTRACTS.

Contracts authorized by the Secretary of the Interior, which were entered into between an acting supervising engineer in the United States Reclamation Service and certain users of water furnished for irrigation purposes by the Reclamation Service, are within the purview of section 3744, Revised Statutes, and copies thereof should be filed in the returns office of the Department of the Interior by the officer making and signing the same.

DEPARTMENT OF JUSTICE,

November 8, 1909.

SIR: I am in receipt of your letter of October 21, 1909, inclosing copies of a number of contracts entered into between an acting supervising engineer in the United States Reclamation Service, authorized by the Secretary of the Interior, and certain users of water furnished for irrigation purposes by the Reclamation Service in the Yuma Valley, Arizona. You call my attention to section 3744, Revised

Statutes, and request an opinion whether such contracts are required by that section to be filed in the returns office in the Department of the Interior.

Section 3744 is as follows:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the returns office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return."

This section is taken from the first section of "An act to prevent and punish fraud on the part of officers intrusted with making of contracts for the Government," approved June 2, 1862. (12 Stat. 411.) The other sections of that act, except section 4, which is now sections 512-514, Revised Statutes, are sections 3745, 3746, and 3747, Revised Statutes.

This section 3744 may be taken in connection with section 3709, Revised Statutes. They both refer to contracts made after advertising for bids, offers, and proposals. Section 3709 is confined to purchase and contracts "for supplies and services, except for personal services," in any of the departments of the Government. Section 3744 is confined to contracts by the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior and their duly authorized subordinates; but embraces any contract made by these officers for any purpose.

The provisions of section 3744 are explicit and mandatory. Two operations are required—the one respecting the

execution of the contract, the other the necessity and manner of recording the instrument. "It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to cause and require every contract * * * to be reduced to writing and signed by the contracting parties with their names at the end thereof." Without these solemnities and formalities the contract is void.

In *Clark v. United States* (95 U. S. 539 542) the court say:

"* * * It makes it unlawful for contracting officers to make contracts in any other way than by writing signed by the parties. This is equivalent to prohibiting any other mode of making contracts. Every man is supposed to know the law. A party who makes a contract with an officer without having it reduced to writing is knowingly accessory to a violation of duty on his part. Such a party aids in the violation of the law. We are of opinion, therefore, that the contract itself is affected, and must conform to the requirements of the statute until it passes from the observation and control of the party who enters into it."

The clauses requiring the filing of copies in the returns office are likewise mandatory. While the failure to comply with this mandate will not invalidate the contract, because it had passed beyond the control of the party entering into it, yet the officer can not be excused for the neglect of the duty imposed upon him to file the copy.

It may be urged that, because the statute requires that "a copy shall be filed by the officer making and signing the contract in the returns office of the Department of the Interior * * * together with all bids, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same," the contracts embraced in the act are those which are entered into after advertisement and proposals.

This position is suggested in your letter. The contracts made with water users are not based upon advertisements and bids. Such a practice would be impossible. The terms upon which the parties are entitled to purchase the

water are fixed and determinate. They are not the subject of competition in any way.

But when these transactions are properly made the subject of contract, the contracts must be governed by existing law. Section 3744 says "every" contract must be filed in the Returns Office of the Interior, an apartment in which the Secretary of the Interior "shall cause to be filed the returns of contracts made by the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior." (Sec. 512, Rev. Stat.)

In *French v. Spencer* (21 How. 228, 238), the court said: "The act of March 5, 1816, has no reference to, or necessary connection with, any other bounty-land act; it is plain on its face and single in its purpose. And, then, what is the rule? One that can not be departed from without assuming on part of the judicial tribunals legislative power. It is, that where the legislature makes a plain provision, without making any exception, the courts can make none. *McIver v. Ragan*, 2 Wheat. 25; *Patton v. McClure, Martin & Yerger's*, Tenn. 345, and cases cited; *Cocke & Jack v. McGinniss*, ib. 365; *Smith v. Troup*, 20 Johns. 33.)"

There is no statute which excepts contracts made under the reclamation law. There is, then, no difficulty in the construction of the statute. "It is plain on its face." That those contracts were not in the contemplation of the statute of section 3744 when passed, does not limit its extent. As was said by Mr. Justice Brown in *De Lima v. Bidwell* (182 U. S. 1 197): "While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope."

The reclamation act of July 17, 1902 (32 Stat. 389), does provide for contracts to be let by the Secretary of the Interior for the construction of irrigation works. These contracts must be evidenced with the same formalities as those contracts made by that officer on behalf of the Government. So must the contract for the use of the water. And if these contracts must be brought within the requirement of the law as to being reduced to writing and signed by the parties, so they must be as to the equally mandatory provision requiring them to be filed in the returns office.

70 *Philippine Internal-Revenue Stamps—Funds from Sale.*

The reclamation act requires that all moneys received from any source in an irrigation project shall be paid into the reclamation fund. All charges are determined with the view of returning to the reclamation fund the cost of construction of each project so that the moneys can be used for other irrigation works. It is certainly within the policy of the statute that all the contracts pertaining to irrigation projects should be recorded in the Interior Department in order that the condition of the projects and of the reclamation fund may be readily ascertained.

I am of opinion that the contracts referred to in your letter are within the purview of section 3744 and that copies of the same should be filed, by the officer making and signing the same, in the returns office of the Department of the Interior.

Very respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

PHILIPPINE INTERNAL - REVENUE STAMPS — FUNDS
DERIVED FROM SALE.

Funds derived from the sale of internal-revenue stamps in the Philippine Islands belong to the Philippine government, under the provisions of section 4 of the act of March 8, 1902 (32 Stat. 54), and should be paid into the Philippine treasury. This section remains in full force and effect, notwithstanding the provisions of section 5 of the tariff act of August 5, 1909 (36 Stat. 84, 85).

Where there are two acts upon the same subject they must stand together if possible, but if they are repugnant in any of their provisions, the later act operates as a repeal of the earlier only so far as its provisions are repugnant to the provisions of the earlier act.

DEPARTMENT OF JUSTICE,
November 12, 1909.

SIR: I have the honor to acknowledge receipt of your communication of the 6th instant, in which you request my opinion as to whether or not funds derived from the sale of internal-revenue stamps in the Philippine Islands belong to the Philippine government under the provisions of section

4 of the act of Congress approved March 8, 1902; and in reply thereto will say:

The act referred to (32 Stat. 54) is entitled "An act temporarily to provide revenue for the Philippine Islands," and the first section thereof confirms an act passed by the United States Philippine Commission entitled "An act to revise and amend the tariff laws of the Philippine Archipelago;" the second section provides for the levy and collection of certain duties upon articles coming into the United States from the Philippine Islands; the third section provides for a tonnage tax upon vessels coming into the United States from the Philippine Archipelago; and the fourth section reads as follows:

"That the duties and taxes collected in the Philippine Archipelago in pursuance of this act, and all duties and taxes collected in the United States upon articles coming from the Philippine Archipelago and upon foreign vessels coming therefrom, shall not be covered into the general fund of the Treasury of the United States, but shall be held as a separate fund and paid into the treasury of the Philippine Islands, to be used and expended for the government and benefit of said islands."

Under the provisions of this statute, all the revenues derived from the sources mentioned were paid over to the Philippine government until the passage of the tariff act of 1909. The fifth section of said tariff act deals exclusively with the imposition and collection of duties upon goods shipped into the United States from the Philippine Islands, and into the Philippine Islands from the United States; and the latter portion of said section (36 Stat. 84, 85), which is alone pertinent to the present inquiry, reads as follows:

"That there shall be levied, collected, and paid, in the United States, upon articles, goods, wares, or merchandise coming into the United States from the Philippine Islands, a tax equal to the internal-revenue tax imposed in the United States upon the like articles, goods, wares, or merchandise of domestic manufacture; such tax to be paid by internal-revenue stamp or stamps, to be provided by the

Commissioner of Internal Revenue, and to be affixed in such manner and under such regulations as he, with the approval of the Secretary of the Treasury, shall prescribe; and such articles, goods, wares, or merchandise shipped from said islands to the United States shall be exempt from the payment of any tax imposed by the internal-revenue laws of the Philippine Islands:

“And provided further, That there shall be levied, collected, and paid in the Philippine Islands, upon articles, goods, wares, or merchandise going into the Philippine Islands from the United States, a tax equal to the internal-revenue tax imposed in the Philippine Islands upon the like articles, goods, wares, or merchandise of Philippine Islands manufacture; such tax to be paid by internal-revenue stamps or otherwise, as provided by the laws in the Philippine Islands, and such articles, goods, wares, or merchandise going into the Philippine Islands from the United States shall be exempt from the payment of any tax imposed by the internal-revenue laws of the United States:

“And provided further, That, in addition to the customs taxes imposed in the Philippine Islands, there shall be levied, collected, and paid therein upon articles, goods, wares, or merchandise, imported into the Philippine Islands from countries other than the United States, the internal-revenue tax imposed by the Philippine government on like articles manufactured and consumed in the Philippine Islands or shipped thereto, for consumption therein, from the United States:

“And provided further, That from and after the passage of this act all internal revenues collected in or for account of the Philippine Islands shall accrue intact to the general government thereof and be paid into the insular treasury, and shall only be allotted and paid out therefrom in accordance with future acts of the Philippine legislature, subject, however, to section seven of the act of Congress approved July first, nineteen hundred and two, entitled ‘An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes:’

"And provided further, That, until action by the Philippine legislature, approved by Congress, internal revenues paid into the insular treasury, as hereinbefore provided, shall be allotted and paid out by the Philippine Commission."

Section 41 of said tariff act of 1909 contains the general provision that "all acts and parts of acts inconsistent with the provisions of this act, are hereby repealed" (36 Stat. 118), and it is not specifically declared therein that the act of March 8, 1902, is in any respect modified or repealed.

It is insisted, however, upon the part of the Bureau of Internal Revenue, that the above-quoted provision of the tariff act of 1909 is complete within itself and constitutes a complete scheme for the collection of revenue from the various classes of shipments mentioned therein, and that, therefore, it repeals by implication section 4 of the act of March 8, 1902, as well as the sections thereof relating to the imposition and collection of duties.

I am of the opinion that this contention is not well founded, and that section 4 of said act of March 8, 1902, remains in full force and effect, and that the revenue in question belongs to the Philippine government.

It is a principle of construction recognized by all courts that where there are two acts upon the same subject, they must stand together, if possible, but that if the two are repugnant in any of their provisions, the later act operates as a repeal of the earlier only so far as its provisions are repugnant to the provisions of the earlier act. In applying this principle in *Henderson's Tobacco*, 11 Wall. 652, 657, the Supreme Court of the United States used the following language:

"Statutes are, indeed, sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing, manifests a clear intent to abolish the old law. In the *United States v. Tynen* (*supra* 92) it was said by Mr. Justice

Field, that 'when there are two acts upon the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not, in express terms, repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' For this several authorities were cited, some of which have been cited on the present argument. This is, undoubtedly, a sound exposition of the law. But it must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, *so far* as the provisions of the subsequent statute are repugnant to it, or *so far* as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal can not be allowed."

It will be observed that the provisions above quoted from section 5 of the tariff act of 1909 relate to the imposition and collection of duties, and that they were not intended to provide for their distribution and expenditure. It can not be doubted that, in so far as the act of March 8, 1902, imposes a certain rate of duty upon shipments from the Philippine Islands into the United States, the two acts cover precisely the same ground, and the former is necessarily repealed by the latter. But, by section 4 of the former act it was specifically declared that revenues so collected should be paid into the treasury of the Philippine Islands; and what is there in the latter act that is in any respect inconsistent with this declaration? It nowhere provides, either by specific language or inferentially, that such revenues shall belong to the United States Government, unless the fact that the tax is imposed upon goods shipped into the United States from the Philippine Islands would create such an inference. In the absence of any specific legislation upon the subject, such an inference might be drawn from the fact stated; but certainly a possible inference of this character can not be regarded as such an incon-

sistency as to work a repeal of the positive provision of the former act. On the other hand, it is plainly implied in the next to the last proviso above quoted of the tariff act of 1909 that it was not intended to divert the revenue so collected from the treasury of the Philippine Islands. It is therein provided:

"That from and after the passage of this act all internal revenues collected in or *for account of* the Philippine Islands shall accrue to the general government thereof."

This clearly implies that some of the taxes imposed by the previous parts of the section should be collected for the government of the Philippine Islands, but by other than the officials of said government, and it is only by virtue of section 4 of said act of March 8, 1902, that such collection can be made.

I am therefore constrained to sustain the contention of the Bureau of Insular Affairs, and hold that the revenue in question should be paid into the treasury of the Philippine Islands.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

GOVERNMENT WITNESSES NOT EMPLOYEES OF THE GOVERNMENT.

Expert witnesses for the Government in cases arising under the food and drugs act are not "employees" as the term is used in the agricultural appropriation act of March 4, 1907 (34 Stat. 1280), or in section 2687, Revised Statutes.

The word "employee" as thus used does not embrace persons whose services have been contracted for in connection with a particular case in court, and whose employment has no degree of permanence.

DEPARTMENT OF JUSTICE,

November 15, 1909.

SIR: I have the honor to acknowledge receipt of your communication of the 13th instant, in which you ask my opinion whether the services of expert witnesses procured to give testimony on behalf of the Government in cases

arising under the food and drugs act, may be contracted for at a rate per diem which would, if continued for a whole year, amount to more than \$3,500.

The Comptroller of the Treasury has ruled (Decisions of the Comptroller, Vol. XV, p. 757) that the fees of expert witnesses in cases of this character are properly payable from the appropriation made for the Department of Agriculture, styled "General expenses, Bureau of Chemistry" (35 Stat. 1049). The act of March 4, 1907 (34 Stat. 1280), making appropriation for the Department of Agriculture for the fiscal year ending June 30, 1908, contained the following proviso:

"Provided, That the maximum salary of any classified scientific investigator in the city of Washington, or other employee engaged in scientific work, shall not exceed three thousand five hundred dollars per annum."

Section 2687 of the Revised Statutes reads as follows:

"Collectors and all other officers of the customs, serving for a less period than a year, shall not be paid for the entire year, but shall be allowed in no case a greater than a pro rata of the maximum compensation of such officers respectively for the time only which they actually serve as such collectors or officers, whether the same be under one or more appointments, or before or after confirmation. And no collector or other officer shall, in any case, receive for his services, either as fees, salary, fines, penalties, forfeitures, or otherwise, for the time he may be in service, beyond the maximum pro rata rate provided by law."

"And this section shall be applied and enforced in regard to all officers, agents, and employees of the United States whomsoever, as well as those whose compensation is determined by a commission on disbursements, not to exceed an actual maximum, as those paid by salary or otherwise."

The question is whether witnesses giving expert testimony on behalf of the Government in cases of the character above mentioned are employees engaged in scientific work, within the meaning of the proviso of said act of 1907, and if so, whether the amount of compensation which may be

received by them is limited by the provisions of said section 2687, Revised Statutes.

I am of the opinion that such persons do not fall within the meaning of the term "employee," as used in either of said statutes.

In *Louisville, etc., R. R. Co. v. Wilson* (138 U. S. 501, 505), it was insisted on behalf of the defendant in error that he was entitled to have paid him a certain sum as attorney's fees under an order of court directing the receiver to pay "salaries of officers and wages of employees" that had accrued within a specified time. The court held that Wilson did not fall within the meaning of the term "employee" as used in said order, and in passing upon this question used the following language:

"The terms 'officers' and 'employees' both alike refer to those in regular and continual service. Within the ordinary acceptance of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employee. They imply continuity of service, and exclude those employed for a special and single transaction. An attorney of an individual, retained for a single suit, is not his employee. It is true, he has engaged to render services; but his engagement is rather that of a contractor than that of an employee. The services of appellee, therefore, did not come within the order appointing the receiver."

See also *Vane v. Newcombe* (132 U. S. 220, 237); *Frick Company v. Norfolk & O. V. R. Co.* (86 Fed. 725, 738).

I think the language of the court in *Louisville, etc., R. R. Co. v. Wilson* is equally applicable to the meaning of the word "employee" as used in the statutes above cited, and that it does not embrace an individual whose services have been contracted for in connection with a particular case in court, and with reference to whose employment there is no degree of permanency.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF AGRICULTURE.

78 *Civil Service—Census Act 1909—Diplomatic Service.*

CIVIL SERVICE—CENSUS ACT OF 1909—DIPLOMATIC AND
CONSULAR SERVICE.

The proviso of section 7 of the census act of July 2, 1909 (36 Stat. 3), has no reference to examinations for positions in the diplomatic and consular service which are not in the departments at Washington.

The phrase "from any State or Territory" in that proviso refers to applications where it is requisite that the applicant should be of a particular State or Territory and charged to it under the law of apportionment, which is the case only with respect to appointments in the classified service in the departments at Washington and in the Census Bureau.

A construction of a statute which would go beyond the evil intended to be remedied and produce apparently unforeseen and untoward results should be avoided.

Opinions of August 18, 1909 (27 Op. 546, 567), are modified to the extent above indicated.

DEPARTMENT OF JUSTICE,
November 15, 1909.

SIR: Under date of the 11th instant, you asked to be advised whether the following proviso of section 7 of the census act approved July 2, 1909 (36 Stat. 3), applies to the examinations leading to appointment as secretary in the diplomatic service, consul, consular assistant, or student interpreters:

"Provided, That hereafter all examinations of applicants for positions in the government service, from any State or Territory, shall be had in the State or Territory in which such applicant resides, and no person shall be eligible for such examination or appointment unless he or she shall have been actually domiciled in such State or Territory for at least one year previous to such examination."

In connection with this matter, your letter presents the following facts:

The mode of appointment of secretaries of embassy and legation is fixed by an order of the President, dated November 10, 1905, which provides that—

"* * * vacancies in the office of secretary of embassy or legation shall hereafter be filled:

"(a) By transfer or promotion from some branch of the foreign service; or

"(b) By the appointment of a person who, having furnished satisfactory evidence of character, responsibility, and

capacity, and being thereupon selected by the President for examination, is found upon such examination to be qualified for the position."

The mode of appointment of consuls-general, consuls, consular assistants, and student interpreters is governed by an order of the President, issued June 27, 1906, which provides that vacancies in the office of consul-general and in the office of consul above class 8 shall be filled by promotion from the lower grades of the consular service or by transfer of persons in the Department of State receiving \$2,000 per annum or more, and that—

"2. Vacancies in the office of consul of class 8 and of consul of class 9 shall be filled:

"(a) By promotion on the basis of ability and efficiency as shown in the service, of consular assistants and of vice-consuls, deputy consuls, consular agents, student interpreters, and interpreters in the consular or diplomatic service, who shall have been appointed to such offices upon examination.

"(b) By new appointments of candidates who have passed a satisfactory examination for appointment as consul as hereafter provided.

* * * * *

"11. It shall be the duty of the board of examiners to formulate rules for and hold examinations of persons designated for appointment as consular assistant or as student interpreter * * *."

The board of examiners for the diplomatic service consists of the Second Assistant Secretary of State, the Solicitor for the Department of State, and the Chief of the Diplomatic Bureau of the department, or the persons for the time being respectively discharging the duties of said officers.

The board of examiners for the consular service, as named by the order of the President, consists of the Secretary of State, or such officer of the Department of State as the President shall designate (at present the Third Assistant Secretary of State), the Chief Clerk of the Department of State, and the chief examiner of the Civil

Service Commission, or some person whom said commission shall designate.

The examinations for the diplomatic and consular service have always been held in the city of Washington. In regard to such examinations you say:

"They consist of two parts, oral and written. The object of the oral examination is to determine the candidates' alertness, character, address, command of English, and, in general, their personal fitness for the service. While it is quite practicable for the written examinations to be held in the legal residences by officials of other branches of the Government stationed therein, it can be readily seen that the other and important functions of the members of the boards would preclude them from making personal tours of the country to conduct the oral examinations, and that the object of the oral examination would largely be lost if this duty should be designated to officials of other branches of the Government stationed at points where the examinations were to be held. Such officials would naturally not have adequate opportunity to become fully conversant with the standards required by the boards."

In this connection you further state:

"I also desire to submit for your consideration the fact that if the provisions of section 7 are found to be applicable to examinations for the foreign service, many men now holding subordinate positions in the service abroad who would, in the usual course, later be designated for and take the examinations in order to become eligible for promotion to the commissioner personnel, would be ineligible for the examination because of their failure, due to their official duties, to have been actually domiciled in the State or Territory of their legal residence for at least one year previous to their examination. With the absence of the incentive of promotion, the department would doubtless be handicapped in its obtaining the type of men it needs in the subordinate positions in its offices abroad."

The above-quoted proviso of section 7 of the census act was considered by me in my opinions to the President and the Secretary of the Interior of August 18, 1909 (27 Op.

546, 537). It was held in the first opinion that the residence and domicile restrictions of that proviso were "applicable to all persons authorized to be appointed in the government service after examination," and were not limited to examinations for appointments required by the civil-service act and rules to be apportioned among the several States and Territories. In the opinion to the Secretary of the Interior, it was held that the proviso referred to "applies to all cases where, by law or regulation pursuant to law, an appointment to a position in the government service can only be made after an examination of the applicant," the inquiry in that case being whether such proviso applied to positions in the government service outside of the city of Washington.

These conclusions were based upon the broad language of the proviso, which in terms covers *all* examinations for positions in the government service, and is not expressly limited to the apportioned service or the service at Washington.

Since the rendition of those opinions, however, my attention has been called to the extensive nature of the field service of the Government for which examination is required as a condition of appointment, and the inconvenience and expense which the broad application of the proviso would occasion have suggested the inquiry whether, in view of the circumstances attending its enactment, it could have been intended to apply to other than the apportioned service, which is confined to the departments at Washington and the Census Bureau.

I am informed that there are about 200,000 positions in the government service outside of Washington for which examinations are required, as against about 15,000 in the departments here subject to the law of apportionment. It is apparent, therefore, that any inconvenience and expense which will be occasioned by the application of the residence and domicile restrictions to the apportioned service will be greatly increased if they are extended to the field service.

I am further advised that, in many cases, it is much more convenient and less expensive to applicants to be examined

across the state line in another State, than at the nearest place in their own State where the Civil Service Commission has facilities for the purpose, and that, at points where two cities are located in the same neighborhood, one on the state line in one State and the other in the adjoining State, it has been the practice, in order to economize in the time and number of examiners and in other expenses of an examination, to designate only one of such cities as an examination point for applicants from both States within a convenient radius of that point.

It is also said that if the residence and domicile restrictions are applied generally they will necessarily limit competition, and, in the case of professional, scientific, and technical positions in the government service, many of the persons best qualified would be excluded from the examinations, because, from the nature of their profession and avocation, these persons are peripatetic and are not actually domiciled in any one State for as much as a year at a time.

The impracticability of conducting the examinations for the diplomatic and consular service at any other place than the city of Washington is pointed out in your letter.

In view of the fact that the domicile restriction of the proviso in question is not to be interpreted as requiring the bodily presence of the applicant within the State, during the period of one year before the examination, as held in my opinion to the President above referred to, there will not be as much inconvenience on this score as is apparently anticipated. Yet it is manifest that serious inconvenience and considerable expense would be entailed by the application of the residence restriction to the extensive field service of the Government outside of Washington, and a further study of the proviso in the light of such considerations has led me to reconsider my previous interpretation and to conclude that the proviso is properly to be interpreted as applying only to the examinations for the apportioned service of the Government at Washington. It is true, as pointed out in the opinions above referred to, that the proviso applies to *all* examinations for admission to the government service, but it applies only in the case

of applicants "from any State or Territory." The use of this phrase is significant and must be taken as referring to those applications where it is requisite that the applicant should be of a particular State or Territory and charged to it under the law of apportionment. This is the case only with respect to appointments in the classified service in the departments at Washington and in the Census Bureau. All that occurred in Congress in connection with the insertion of this proviso in section 7, which is referred to in my former opinions, shows that the protection of the rights of the several States in respect to the apportioned service was the real object thereof. The field service of the Government was not even mentioned. This being so, a construction which would go beyond the evil intended to be remedied and produce apparently unforeseen and untoward results should, upon well settled principles, be avoided. (*Dartmouth College v. Woodward*, 4 Wheat. 518, 645; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 459.)

I am therefore of opinion that the proviso in question has no reference to examinations leading to appointments in the diplomatic and consular service which are not in the departments at Washington, and my former opinions on this subject are modified to the extent indicated.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF STATE.

PENSIONS—HONORABLY DISCHARGED SOLDIERS AND SAILORS—TERMS OF DISCHARGE ARE CONCLUSIVE.

In determining the pensionable status of a person who served in the civil war, under the acts of June 27, 1890 (26 Stat. 182), and of February 6, 1907 (34 Stat. 879), the Department of the Interior is concluded by the terms of a discharge granted by the Navy Department as "honorable."

By using the words "honorably discharged," in the acts above referred to, Congress intended to adopt or act upon the actual past discharges as honorable, if of a kind generally so regarded by the War and Navy departments and military men of the branches in question at the time the separation or discharge took place.

In construing these pensions the question to be determined is not what should have been granted but what was granted.

DEPARTMENT OF JUSTICE,
November 16, 1909.

SIR: I have received your request for an opinion concerning pensions under the acts of Congress of June 27, 1890 (26 Stat. 182), and of February 6, 1907 (34 Stat. 879), to persons who served in the civil war. In both of those statutes one "condition" of receiving a pension is to have been "honorably discharged." Your question concerns this phase and is as follows:

"Is this department, in determining pensionable status, concluded by the terms of a discharge granted by the Navy Department as honorable?"

It seems that your department or its Pension Bureau has been inquiring into the actual causes of discharge in the way of diseases discreditable to the individual and the like and refusing to be concluded as mentioned.

It is not a simple matter to determine whether a man had or had not a "discharge granted as honorable."

If Congress, when it passed the earlier act, that of 1890, had some fixed definition in mind of an honorable discharge, a definition which would not change with any changing practice or views of the War or Navy departments, or changing views of American military men in general, our inquiry would be what was that congressional definition, and, when found, that would end the matter.

Congress may, however, have had in mind no such fixed definition and have meant that the Navy Department or War Department would have determined at the time of discharging an individual that the discharge or separation from service should be honorable or not, and that the Pension Department should govern itself accordingly, even if one individual had been given an honorable discharge and another, at a later or earlier time, had not, although the facts about their service were the same. If so, as far as such determination took the form of an *express* honorable discharge, no doubt could well arise as to the views and intent of the military department; but it is not from such express honorable discharges that your difficulty has now arisen.

It is possible that in saying "honorably discharged," Congress intended that the only thing to be considered (as to the naval service) should be the express certificate of honorable discharge given under the following sections of the Revised Statutes taken from the act of March 2, 1855 (10 Stat. 627):

"SECTION 1426. Honorable discharges may be granted to seamen, ordinary seamen, landsmen, firemen, coal heavers, and boys who have enlisted for three years.

"SECTION 1427. Honorable discharges shall be granted according to a form prescribed by the Secretary of the Navy."

The two pension laws to which you refer concern both the army and the navy, and if Congress had its own fixed, unchanging definition of "honorably discharged," of course it was intended to be the same for both services; but if, on the other hand, it had no such fixed definition, there is no apparent reason why it should be held to intend to speak of the honorable discharges of a soldier and of a seaman as existing only in cases where their behaviours in the service were similar. One department might treat one kind of conduct as inconsistent with the allowance of an honorable discharge, and the other not, according to practical considerations and the traditions of the two services.

In both services "dishonorable discharge" was given only after a trial by court-martial and as a punishment. In the army, in case of discharge for cause, without court-martial, it was customary to state on the certificate that discharge was in pursuance of an order, giving the number thereof, and this order must be referred to to learn the specific cause.

For the same service we find in article 4 of the Articles of War, originally article 11, from the act of April 10, 1806, the following language:

"No enlisted man, duly sworn, shall be discharged from the service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer, when no field officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the President, the

Secretary of War, the commanding officer of a department, or by sentence of a general court-martial."

There seems to be no statutory provision for a certificate of express honorable discharge such as in the naval service is called for by Revised Statutes, 1427, above quoted. Article 4 recognizes the right to discharge summarily.

The discharges from the army were reduced to more regular form by a circular, No. 15, of May 11, 1893, and the subject of this circular is now treated in section 148 of the army regulations of 1908. The circular reads as follows:

"The following rules for the use of the new blank forms for honorable discharge, dishonorable discharge, and discharge without honor, having been approved by the Secretary of War, are published to the army for the information and guidance of all concerned:

"1. The parchment discharge blank will hereafter be used only for 'honorable discharge,' and the word 'honorably' will be interlined in old blanks when used.

"2. The blank for 'dishonorable discharge' will be used in all cases of dishonorable discharge.

"3. The blanks for discharge 'without honor' will be used in the following cases only:

"(a) When a soldier is discharged without trial on account of fraudulent enlistment.

"(b) When he is discharged without trial on account of having become disqualified for service, physically or in character, through his own fault.

"(c) When the discharge is on account of imprisonment under sentence of a civil court.

"(d) When at the time of the soldier's discharge, at or after the expiration of his term of enlistment, he is in confinement under the sentence of a general court-martial which does not provide for dishonorable discharge. Blanks for 'dishonorable discharge' and 'discharge without honor' are sent to post commanders."

Under the Navy Department, as I understand, there long have been (and are now) four kinds of discharges, namely, expressly honorable, dishonorable after court-martial, for "bad conduct" (also after court-martial), and

"ordinary," familiarly called "*small*" discharge. I find upon inquiry that in the army there seems to have been no clear distinction in the form of discharge paper issued, as between the case in which the discharge was for "bad conduct" and was not for "bad conduct," nor is "bad conduct" a familiar phrase in connection with the army discharges. Prior to the circular above quoted the same printed form would be used in both the case of persons discharged for misconduct and that of persons whose records, although they were not discharged for misconduct, were not so satisfactory that it was deemed proper to certify to their good character on their discharge papers. In both of those cases the custom was to cut off from the discharge paper a part which carried as a heading for remarks the word "character," and, as above stated, where discharge was for cause and not by reason of expiration of term of enlistment, the order authorizing the discharge was noted on the certificate.

When this word was not cut off, the blank under it was usually filled by some such word as "good."

As has just been said, this part was cut off both when a man was discharged for some ill conduct or the like, and when wrong conduct had nothing to do with the discharge or termination of the service—in cases where, say, at the end of the enlistment period, it was not deemed the proper thing to expressly and affirmatively approve the services upon the certificate of discharge as having been "good."

In the naval service the four different kinds of discharges, including for "bad conduct" and "ordinary" or "*small*" discharge, were used at least as far back as the date of the pension act of Congress of 1890 now under consideration.

Assuming, as we should, that in 1890 Congress was aware of the practice of each department, the question arises whether it intended in using the phrase "honorably discharged" in a pension law to have the relief confined, as to the navy, to persons receiving express honorable discharges under the statutes above quoted (Rev. Stat. 1426 and 1427) or, on the other hand, to treat as "honorably discharged" persons getting any other discharge the department may have "granted as an honorable discharge."

As for the express honorable discharge in the naval service, that has been given to "all persons who are recommended by the captain for fidelity, obedience, and ability during the term of service." (Regulations of 1908.) In both services, as I understand, decided opinions have existed as to the question whether any particular kind of discharge was an honorable one or was not.

I have given this general explanation in order that the whole subject may be better understood, and shall now proceed to express my views upon what I understand to be the questions that have troubled your department.

Congress in the pension laws of 1890 and 1907 may be regarded as using the phrase of "honorably discharged" in the same sense in both laws, and in the sense in which it was used in the earlier law, whatever that may be. The acts are in *pari materia* and, had the intention existed in 1907 to change the meaning, such intent would have found expression.

I see no reason to believe that Congress had in mind any fixed definition of its own of an honorable discharge, including elements having to do with the actual conduct of the discharged individual, as distinguished from the notion of adopting the possibly varying practices of the two departments. In other words, I do not think that Congress intended to go behind any conceptions and practices of the War Department and the conceptions of American military men in the matter of an honorable discharge, or to go behind any such conceptions and practice in the Navy Department and service, even if that should differ from the practice of the War Department and army.

Congress either intended to treat an express honorable discharge as the only discharge now in question, so far as the navy is concerned, or intended to adopt or act upon the actual past discharges as an honorable one, if of a kind generally so regarded by the War and Navy departments and military men of the branch in question at the time the separation or discharge took place. In my opinion, the latter was the intention of Congress. If you find that a discharge, when given, belonged to a class then commonly accepted

among military men and at the War or Navy departments (according to whether it is a naval or army discharge) as constituting a man an "honorably discharged" person, and particularly if so accepted at and before the passage of the pension law of 1890, I think Congress intended to treat that as an honorable discharge for the purpose of that law and the pension act of 1907. The War and Navy departments are parts of the executive branch of the Government having to do with a man's discharge from the service as an executive matter and having special care and executive charge of the man's service and of his military honor and standing. This charge they have while the man is in the service and until the moment he leaves it. Whether he should go with or without honor, these departments determine when they part from him. When they do so determine, they become, at least in the absence of fraud or gross mistake, *functus officio*, and the executive branch of the Government thereby becomes *functus officio*. On the other hand, when Congress passes laws, long after discharge, to give discharged individuals pensions, it imposes upon a quasi judicial bureau the determination of the question whether what was formerly done as an executive act did or did not constitute the individual a person "honorably discharged." In determining that question, your department is not concluded by any recent or present opinions, as such, of the other departments concerning discharges happening at the time of the civil war or shortly after; but it is concluded, in my opinion, from the moment it ascertains whether or not a discharge was, when given, granted as an honorable discharge. In other words, it is not a question now of what should have been granted, but what was granted.

Of course, from a practical standpoint, and as expert evidence, it would be well to consider any present views of the two military departments upon the question whether or not the original act was the granting of an honorable discharge or not. Those departments, even when no longer in charge of the person, should and do take an interest in the honor of the men who have served their country, and that honor is,

with military men, the most important consideration of their lives.

For all of the foregoing reasons, I am of the opinion that your department is "concluded by the terms of a discharge granted by the Navy Department as honorable."

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

COPYRIGHT—IMPORTATION OF BOOKS BOUND ABROAD.

Books copyrighted under the laws of the United States and printed from type set and plates made in this country, the printed sheets of which were sent to Belgium and there bound, can not, under section 31 of the copyright law of March 4, 1909 (35 Stat. 1082), be legally returned to or imported into the United States.

That section embraces every American copyright in a book, regardless of whether the copyright was obtained under the copyright laws embodied in the Revised Statutes, the copyright act of 1891, or the act of 1909.

DEPARTMENT OF JUSTICE,
November 17, 1909.

SIR: I have the honor to acknowledge receipt of your letter of the 11th instant, in which you state the following facts:

On October 5, 1909, there arrived at the port of New York, per steamship *Lapland*, certain books consigned to The C. Wildermann Company. These books were copyrighted by H. L. Kilner & Co. on January 5, 1909, and their importation was authorized by the copyright proprietor. They were printed from type set and plates made in the United States, and the printed sheets were sent to Belgium and there bound, and they were then reimported in the finished condition. The appraiser has reported that their importation is illegal under section 31 of the copyright law of March 4, 1909, in that they were not bound in the United States, and for that reason they have been detained by the collector; and you ask my opinion whether or not the holding of the appraiser is correct.

The portion of section 31 of the act of March 4, 1909 (35 Stat. 1082), here material, reads as follows:

"That during the existence of the American copyright in any book the importation into the United States of any piratical copies thereof or of any copies thereof (although authorized by the author or proprietor) which have not been produced in accordance with the manufacturing provisions specified in section fifteen of this act, or any plates of the same not made from type set within the limits of the United States, or any copies thereof produced by lithographic or photo-engraving process not performed within the limits of the United States, in accordance with the provisions of section fifteen of this act, shall be, and is hereby, prohibited."

Section 5 of said act provides that the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: (a) Books, including composite and cyclopædic works, directories, gazetteers, and other compilations; (b) periodicals, including newspapers; and nine other classes are mentioned therein.

Section 15, which is referred to in said section 31, provides that of the printed book or periodical specified in section 5, subsections (a) and (b)—

"except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this act, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photo-engraving process, then by a process wholly performed within the limits of the United States, and the printing of the text *and binding of the said book* shall be performed within the limits of the United States." (35 Stat. 1078.)

My attention has been called to two opinions from this department construing and applying a similar provision in the copyright act of 1891 (26 Stat. 1107), one by Solicitor-General Conrad (21 Op. 159) and the other by Attorney-

General Griggs (23 Op. 371), which, it is supposed, have some bearing upon the question here presented. By section 3 of said act of 1891 section 4956 of the Revised Statutes was amended so as to read as set forth therein, and one of the necessary prerequisites therein prescribed for securing a copyright was that the applicant should, not later than the date of publication in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, or deposit in the mail within the United States, addressed to the Librarian of Congress, two copies of the book or thing sought to be copyrighted, which, in the case of a book, should be printed from type set within the limits of the United States; and it was further provided:

“During the existence of *such copyright* the importation into the United States of any book * * * *so copyrighted*, or any edition or editions thereof, or any plates of the same not made from type set * * * within the limits of the United States, shall be, and it is hereby, prohibited.”

In the first opinion above mentioned the facts apparently were that American owners of an American copyright obtained on an American literary work before the passage of the act of 1891 were seeking, under that act, to prevent the importation of an unauthorized foreign edition, and Solicitor-General Conrad held that the above-quoted provision was applicable and prohibited their importation, although the copyright was not issued under said act of 1891.

In the latter opinion the facts were that Harper & Bros. were endeavoring to import an eighth edition of Liddel & Scott's Greek-English Lexicon, which had been copyrighted in the United States under the copyright laws existing before the passage of the act of 1891, said importation consisting of the folded and unstitched sheets, designed to be stitched and bound in volumes in this country, but which had not been printed from type set within the limits of the United States; and Attorney-General Griggs held that the prohibition contained in section 4956, Revised Statutes, as amended by said act of 1891, did not prohibit the importation, because the copyright was procured under the copyright law as it existed before said amendment was made.

While there was a difference in the facts presented, yet it is difficult to draw any distinction between the principles involved in these two opinions. The question answered in the first was: "Whether section 3 of said act (of 1891) is applicable to books copyrighted prior to the passage of said act," and precisely the same question was presented and answered in the second opinion. But, although doubt was expressed in the latter as to the correctness of the result reached in the former, yet it was suggested that a distinction arose from the fact that in the former opinion the statute was invoked to protect an American copyright against the importation of a piratical edition, while in the latter the statute, if applied, would prevent an importation sought to be made by the owner himself of the American copyright. The result was, if the opinions were sufficiently consistent to stand together, that the owners of an American copyright obtained under laws existing before the passage of the act of 1891, received the benefits arising from section 3 of said act, while upon them were not imposed the burdens which were made to accompany those benefits. However, the opposite conclusions reached in those opinions was manifestly the result, not of a difference in the principles involved, but a difference in the process of reasoning. In the former opinion it was held in substance that inasmuch as section 3 was an amendment of section 4956, Revised Statutes, it applied to all copyrights procured thereunder, before as well as after the amendment, although it could not have a retroactive effect as to importations of books made before the passage of the amendment; while Attorney-General Griggs based his conclusion upon the peculiar language of section 4956, Revised Statutes, as amended, holding that the language "during the existence of *such copyright* the importation into the United States of any book, etc., *so copyrighted*," so restricted the clause in question as to make it apply only to copyrights issued under the act *as amended*.

I am inclined to think that, in so holding, due consideration was not given to the fact that the words upon which special stress was laid were, by the act, made a part of said section 4956, Revised Statutes, and thus a part of the

general copyright law, and were, therefore, intended to apply to all copyrights issued thereunder, regardless of whether issued before or after the passage of the act of 1891.

But I do not regard either of these opinions as having any special bearing upon the question now in hand, inasmuch as the language of section 31 of the act of March 4, 1909, does not admit of the construction that was placed upon section 3 of the act of 1891 by Attorney-General Griggs. Said section 31 provides that:

“During the existence of the *American copyright in any book* the importation into the United States of any piratical copies thereof or of any copies thereof (although authorized by the author or proprietor) which have not been produced in accordance with the manufacturing provisions specified in section fifteen of this act,”

is prohibited. This language clearly embraces *every* American copyright in a book, regardless of whether that copyright was obtained under the copyright laws embodied in the Revised Statutes, or the act of 1891, or the copyright act of 1909. If the statute were otherwise, it would have produced the anomalous condition that books copyrighted prior to March 3, 1891, would not be prohibited from importation by any manufacturing provision; that books copyrighted after March 3, 1891, and prior to July 1, 1909, the date upon which the act of March 4, 1909, became effective, would be prohibited unless printed from type set in the United States or from plates made from type set in the United States, while books copyrighted after July 1, 1909, would be prohibited, if not printed from type set in the United States or from plates made from type set therein, and the printing and *binding* both performed within the limits of the United States.

Such a result, I think, was never intended by Congress, and I am therefore of the opinion that the appraiser was right in holding that the importation in question was unlawful.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

HEAD OF NAVY DEPARTMENT AND CHIEFS OF BUREAUS—
VACANCIES—TEMPORARY APPOINTMENTS OF NAVAL
OFFICERS.

Officers of the Navy designated by the Secretary of the Navy to act in an advisory capacity to him, but without executive authority over the other bureaus or officers of the Navy Department, can not be legally designated by the President to act as Secretary of the Navy during the absence or sickness of the Secretary or Assistant Secretary. Such aids, although as rear-admirals and captains and commanders they are officers in the public service of the Government, are not "other officers" in the departments eligible for such temporary appointment under the provisions of section 179, Revised Statutes.

Officers of the Navy holding commissions issued by the President, by and with the advice and consent of the Senate, but who do not hold any office in the Navy Department or in a bureau thereof by appointment of the President, can not be legally designated by the President to act as chiefs of bureaus in the absence of the appointed Chiefs of Bureaus of Equipment, Construction and Repair, and Yards and Docks. Such an officer, although assigned to act as an assistant to an officer in the department, did not thereby become an officer in the department within the meaning of section 179, Revised Statutes.

DEPARTMENT OF JUSTICE,

December 15, 1909.

SIR: I have the honor to acknowledge the receipt of your letter of December 9th instant, in which you request my opinion upon the following:

"I. Can the aids or advisers described in paragraph 3 of this letter be legally designated by the President to act as Secretary of the Navy during the absence or sickness of the Secretary and Assistant Secretary?

"II. Can the subordinate officers referred to in paragraph 4, above, be legally designated by the President to act as chiefs of bureaus in the absence of the appointed Chiefs of Bureaus of Equipment, Construction and Repair, and Yards and Docks?"

The aids described in paragraph 3 are officers of the navy designated by the Secretary of the Navy to act in an advisory capacity to him, but without executive authority over the other bureaus or officers of the Navy Department. They are appointed as officers in the navy by the President, by and with the advice and consent of the Senate, "but do not hold any office in the department

whose appointment is vested in the President, by and with the advice and consent of the Senate."

The subordinate officers referred to in paragraph 4 are officers who "hold commissions issued by the President, by and with the advice and consent of the Senate, but do not hold any office in the department or in a bureau by the appointment of the President."

Section 177 provides for the temporary appointment of a person to supply a vacancy in the head of a department occurring by the death, resignation, absence, or sickness of the head of a department, unless otherwise directed by the President.

Section 178 provides for the temporary appointment to supply a vacancy occurring under similar circumstances of the chief of any bureau, or of any officer thereof, whose appointment is not vested in the head of the department, unless otherwise directed by the President.

Section 179 provides:

"In any of the cases mentioned in the two preceding sections, * * * the President may, in his discretion, authorize and direct the head of any other department or any other officer in either department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease."

While there is some uncertainty in the language of this statute, I think the phrase "any other officer in either department" refers to any officer in any of the departments whose appointment is vested in the President, by and with the advice and consent of the Senate. In other words, I think the power of appointment of officers to supply the vacancy is not restricted to officers within that department in which the vacancy occurs. "Either" is often used in the sense of one of any number. (Century Dictionary.) And this construction makes definite the use of the adjective "other," as applied to officers, whether it refers to the head of another department or to the officer whose office is vacated.

But the person who may be authorized and directed to perform the duties of a vacant office under section 179 must be an officer in a department. It is not sufficient that he has been appointed an officer by the President, by and with the advice and consent of the Senate; he must hold an office in a department which is established by law.

"An office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.

"The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary." (*United States v. Hartwell*, 6 Wall. 385, 393.)

The aids appointed by the Secretary of the Navy, although as rear-admirals and captains and commanders they are officers in the public service of the Government, are not "other officers" in the departments eligible for these temporary appointments. They perform no duties imposed upon them by law. They hold no office created by act of Congress. They are, to use the language of Mr. Justice Miller, in speaking of a somewhat analogous position (*United States v. Germaine*, 99 U. S. 508, 512), "agents, appointed by the (Secretary) and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties."

Officers in the navy are appointed, by provision of law, to perform duties in the Department of the Navy. Thus, by section 421, "The chiefs of the several bureaus in the Department of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections, respectively, or from officers having the relative rank of captain in the staff corps of the navy, on the active list, and shall hold their offices for the term of four years."

These bureau chiefs are officers of offices created by law, and which "embrace the ideas of tenure, duration,

and duties." The aids to the Secretary do not come within the classes designated in section 179. There is no more authority to authorize them to perform the duties of a vacant office than there is to authorize any officer of the navy not connected directly with the business of the department.

I therefore answer your first question in the negative.

Your second inquiry is answered, in effect, by what I have hereinbefore said. You say: "Since September 20, 1906, certain subordinate officers of the above-named bureaus (Construction and Repair, Equipment, and Yards and Docks) have been designated to act as chiefs of bureaus during the absence of the appointed chiefs; the subordinate officers so appointed hold commissions issued by the President, by and with the advice and consent of the Senate, but do not hold any office in the department or in a bureau by the appointment of the President."

The question whether an officer of the navy, detailed and assigned to duty by the Secretary of the Navy, as an assistant to the chief of a bureau, could be authorized to perform the duties of such chief under the provisions of section 178, was submitted to Solicitor-General Taft. He decided, with the approval of the Attorney-General, that the naval officer could not so act. He said:

"Without making a question that the assignment of commissioned officers of the navy to act as assistants to chiefs of bureaus may be within the general power of the Secretary of the Navy, I think that section 178, in the expression 'the assistant or deputy of such chief or of such officer,' can only refer to assistants or deputies whose appointment is specifically provided for by statute. There is no specific provision for the assignment of assistants to chiefs of bureaus from commissioned officers of the Navy." (19 Op. 504.)

The reasoning of this opinion is perfectly applicable to the matter you present to me. The officer of the navy could not be appointed under the circumstances stated in the opinion cited because not one of the officers specifically provided for in the statute. Although he might be assigned to act as an assistant to an officer in the depart-

ment, he did not thereby become an officer in the department. By section 179 the President can authorize and direct an officer in a department whose appointment—that is, appointment to such office—is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office. The subordinate officers referred to in your letter are not in this generic class of officers.

Hence I answer your second question in the negative.

Very respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

**MARKING OF IMPORTED LIQUORS—ENFORCEMENT OF
SECTION 240 OF THE CRIMINAL CODE.**

It is not within the province of the Secretary of the Treasury to prescribe regulations governing the marking of imported liquors to conform to section 240 of the Criminal Code adopted by the act of March 4, 1909 (35 Stat. 1088).

That section is a criminal statute, with no reference to the collection of internal revenue or duties on imports, and there is no statute authorizing the Secretary of the Treasury to formulate rules and regulations for the enforcement of a general criminal statute which has no relation to the collection of revenue.

The Treasury Department may, however, instruct collectors of customs that when a package, shipped from a foreign country or a place subject to the jurisdiction of the United States, but noncontiguous thereto, into the United States, containing intoxicating liquors, and clearly not labeled as required by that section, comes within the observation of a customs officer, he should seize the same and have it declared forfeited by like proceedings as those provided to enforce forfeitures for violation of the customs laws.

DEPARTMENT OF JUSTICE,

December 16, 1909.

SIR: I have the honor to acknowledge receipt of your communication of November 24, 1909, in which you ask my opinion: First, whether it is within the province of your department to prescribe regulations governing the marking of imported liquors to conform to section 240 of the Criminal Code adopted by act of March 4, 1909 (35

Stat. 1088); and, second, if not, what procedure is necessary on the part of your department, acting through the collectors of customs at the ports of importation, to carry into effect the provisions of said section; and in reply thereto will say:

First. I am of the opinion that it is not within the province of your department to prescribe regulations governing the marking of imported liquors to conform to section 240 of the Criminal Code.

Said section appears in chapter 9 of the code, entitled: "Offenses against foreign and interstate commerce," and reads as follows:

"Whoever shall knowingly ship or cause to be shipped, from one State, Territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, any package of or package containing any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of its contents, and the quantity contained therein, shall be fined not more than five thousand dollars; and such liquor shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law."

By section 251, Revised Statutes, the Secretary of the Treasury is required to make rules and regulations—

"to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws, or in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing."

But section 240 is a criminal statute, which has no reference to the collection of either internal revenue or duties on imports, and there is no statute authorizing the Secre-

tary of the Treasury to formulate rules and regulations for the enforcement of a general criminal statute which has no relation to the collection of revenue.

Congress, by making no provision for regulations wherein it might be specified with greater clearness what is meant in said section 240 by the expression—

“solabeled on the outside cover as to *plainly show* the name of the consignee, *the nature of its contents*, and the quantity contained therein,”

manifestly intended the courts to interpret its meaning in cases which shall arise thereunder.

However, by section 7 of the tariff act of 1909 (36 Stat. 85) it is provided:

“That all articles of foreign manufacture or production, which are capable of being marked, stamped, branded, or labeled, without injury, shall be marked, stamped, branded, or labeled in legible English words, in a conspicuous place that shall not be covered or obscured by any subsequent attachments or arrangements, so as to indicate the country of origin,”

and that—

“All packages containing imported articles shall be marked, stamped, branded, or labeled so as to indicate legibly and plainly, in English words, the country of origin and the quantity of their contents,”

and that no package which is not so marked shall be delivered to the importer; and, further, that—

“The Secretary of the Treasury shall prescribe the necessary rules and regulations to carry out the foregoing provision.”

It will be observed, therefore, that under both section 240 of the criminal code and said section 7 of the tariff act the *quantity* of a package of imported intoxicating liquors must be stamped or labeled thereon; and the regulations adopted under the latter act will, to that extent, therefore, incidentally aid in the enforcement of the former.

Second. Clearly, the customs officers can and should render very effective assistance in the enforcement of said section 240 in so far as it applies to imported liquors.

By the last clause in this section it is provided that liquor which is not labeled as required therein—

“shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the seizure and forfeiture of property imported into the United States contrary to law.”

By section 3059, Revised Statutes, it is provided that it shall be lawful for the customs officers to go on board any vessel and examine the same and all persons and baggage on board—

“and if it shall appear that *any breach or violation of the laws of the United States* has been committed, whereby or in consequence of which such vessel, or the merchandise, or any part thereof, on board of or imported by such vessel, is liable to forfeiture, to make seizure of the same, or either, or any part thereof, and to arrest, or in case of escape or any attempt to escape, to pursue and arrest any person engaged in such breach or violation.”

By its terms this statute is made to apply to all laws of the United States by violation of which goods are made liable to forfeiture. But, if as originally enacted as section 2, act of July 18, 1866 (14 Stat. 178), and as carried into the Revised Statutes, it referred solely to customs laws, yet, inasmuch as section 240 of the Criminal Code provides for the forfeiture and seizure of liquors not properly labeled, “by like proceedings as those provided for the seizure and forfeiture of property imported into the United States contrary to law,” it is clear that *this method of procedure* can be used in enforcing said section 240.

But it is a more doubtful question whether customs officers are authorized to make such searches and seizures, when made *solely* for the purpose of enforcing this section. Since, however, they are the only officers authorized to make such searches and seizures in enforcing the customs laws, there is good reason in the view that by extending such method of procedure to the enforcement of this section the power to put it in force was, by implication, vested in these same officials.

But, however this may be, it is a well-settled principle of law that any citizen may seize any property forfeitable

to the use of the Government, either by the municipal law or as prize of war, and it depends upon the Government whether it will act upon the seizure; and a proceeding by the Government to enforce the forfeiture by legal process is a confirmation of the seizure. (13 Op. 253, 256; *The Caledonian*, 4 Wheat. 99, 102; *Gelston v. Hoyt*, 3 Wheat. 245, 310; *Taylor v. United States*, 3 How. 197, 204.)

Consequently an officer would be protected in making a seizure under this statute when there is a clear infraction of the law, although it should be held that he is not vested with such power by section 3059, Revised Statutes.

I am, therefore, of the opinion that the most effective procedure to be adopted by your department to carry into effect the provisions of section 240 of the Criminal Code would be to instruct the collectors of customs that when a package shipped from a foreign country or a place subject to the jurisdiction of the United States, but noncontiguous thereto, into the United States, containing intoxicating liquors, and clearly not labeled as required by said section 240, comes within the observation and control of a customs officer he should seize the same and have it declared forfeited by like proceedings as those provided to enforce forfeitures for violation of the customs laws.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

DISPOSITION OF FRIAR LANDS IN THE PHILIPPINE ISLANDS.

The limitations in section 15 of the act of July 1, 1902 (32 Stat. 696), of the amount of public land which may be acquired by individuals and corporations in the Philippine Islands do not apply to estates purchased by the Philippine government from religious orders pursuant to the authority of sections 63, 64, and 65 of said act.

DEPARTMENT OF JUSTICE,

December 18, 1909.

SIR: In your letter of December 4 instant, you request an opinion upon the question "whether section 15 of the

act of Congress approved July 1, 1902, entitled 'An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes,' limiting the amount of land which may be acquired by individuals and corporations, is made applicable by section 65 of said act to the estates purchased from religious orders in the Philippine Islands pursuant to the authority conferred upon the Philippine government by sections 63, 64, and said section 65 of the act mentioned."

Section 15 must be taken in connection with sections 12 and 13, which are as follows (32 Stat. 695, 696):

"SEC. 12. That all the property and rights which may have been acquired in the Philippine Islands by the United States under the treaty of peace with Spain, signed December tenth, eighteen hundred and ninety-eight, except such land or other property as shall be designated by the President of the United States for military and other reservations of the Government of the United States, are hereby placed under the control of the government of said islands to be administered for the benefit of the inhabitants thereof, except as provided in this act.

"SEC. 13. That the government of the Philippine Islands, subject to the provisions of this act and except as herein provided, shall classify according to its agricultural character and productiveness, and shall immediately make rules and regulations for the lease, sale, or other disposition of the public lands other than timber or mineral lands, but such rules and regulations shall not go into effect or have the force of law until they have received the approval of the President and when approved by the President they shall be submitted by him to Congress at the beginning of the ensuing session thereof and unless disapproved or amended by Congress at said session they shall at the close of such period have the force and effect of law in the Philippine Islands: *Provided*, That a single homestead entry shall not exceed sixteen hectares in extent."

Section 15 then provides:

"That the government of the Philippine Islands is hereby authorized and empowered, on such terms as it may

prescribe, by general legislation, to provide for the granting or sale and conveyance to actual occupants and settlers and other citizens of said islands such parts and portions of the public domain, other than timber and mineral lands, of the United States in said islands as it may deem wise, not exceeding sixteen hectares to any one person and for the sale and conveyance of not more than one thousand and twenty-four hectares to any corporation or association of persons: *Provided*, That the grant or sale of such lands, whether the purchase price be paid at once or in partial payments, shall be conditioned upon actual and continued occupancy, improvement, and cultivation of the premises sold for a period of not less than five years, during which time the purchaser or grantee can not alienate or encumber said land or the title thereto; but such restriction shall not apply to transfers of rights and title of inheritance under the laws for the distribution of the estates of decedents."

The lands referred to in sections 13 and 15 are agricultural lands. They are carefully distinguished from timber and mineral lands. They are lands which have been acquired in the Philippine Islands by the United States under the treaty with Spain. Section 13 is a recognition of homestead entries. Section 15 provides for the grant or sale of lands to actual occupants and settlers and other citizens, but the grants and sale thus made are upon the condition of actual and continued occupancy, improvement, and cultivation for not less than five years.

In accordance with the authority given to it the Philippine Commission enacted the law known as the public land law to carry out the provisions of these sections.

Sections 63, 64, and 65 (32 Stat. 706) were enacted for a different purpose. The authority of the Philippine government in relation to property was largely extended. They are as follows:

"Sec. 63. That the government of the Philippine Islands is hereby authorized, subject to the limitations and conditions prescribed in this act, to acquire, receive, hold, maintain, and convey title to real and personal property, and may acquire real estate for public uses by the exercise of the right of eminent domain.

"SEC. 64. That the powers hereinbefore conferred in section sixty-three may also be exercised in respect of any lands, easements, appurtenances, and hereditaments which, on the thirteenth of August, eighteen hundred and ninety-eight, were owned or held by associations, corporations, communities, religious orders, or private individuals in such large tracts or parcels and in such manner as in the opinion of the commission injuriously to effect the peace and welfare of the people of the Philippine Islands. And for the purpose of providing funds to acquire the lands mentioned in this section said government of the Philippine Islands is hereby empowered to incur indebtedness, to borrow money, and to issue, and to sell at not less than par value, in gold coin of the United States of the present standard value or the equivalent in value in money of said islands, upon such terms and conditions as it may deem best, registered or coupon bonds of said government for such amount as may be necessary, said bonds to be in denominations of fifty dollars or any multiple thereof, bearing interest at a rate not exceeding four and a half per centum per annum, payable quarterly, and to be payable at the pleasure of said government after dates named in said bonds not less than five nor more than thirty years from the date of their issue, together with interest thereon, in gold coin of the United States of the present standard value or the equivalent in value in money of said islands; and said bonds shall be exempt from the payment of all taxes or duties of said government, or any local authority therein, or of the Government of the United States, as well as from taxation in any form by or under State, municipal, or local authority in the United States or the Philippine Islands. The moneys which may be realized or received from the issue and sale of said bonds shall be applied by the government of the Philippine Islands to the acquisition of the property authorized by this section, and to no other purposes.

"SEC. 65. That all lands acquired by virtue of the preceding section shall constitute a part and portion of the public property of the government of the Philippine Islands, and may be held, sold, and conveyed, or leased temporarily for a period not exceeding three years after their acqui-

tion by said government on such terms and conditions as it may prescribe, subject to the limitations and conditions provided for in this act: *Provided*, That all deferred payments and the interest thereon shall be payable in the money prescribed for the payment of principal and interest of the bonds authorized to be issued in payment of said lands by the preceding section and said deferred payments shall bear interest at the rate borne by the bonds. All moneys realized or received from sales or other disposition of said lands or by reason thereof shall constitute a trust fund for the payment of principal and interest of said bonds, and also constitute a sinking fund for the payment of said bonds at their maturity. Actual settlers and occupants at the time said lands are acquired by the government shall have the preference over all others to lease, purchase, or acquire their holdings within such reasonable time as may be determined by said government."

The lands designated in these sections were acquired in an entirely different manner from the property acquired under the treaty with Spain. Their disposition was upon different principles. Complete general power to acquire and dispose of property, real and personal, was given by the section 63 to the Philippine government, subject only to the limitations and conditions of the act. Special provision was made in the sixty-fourth section for the acquisition of lands owned or held by associations, corporations, communities, religious orders, or private individuals in such large tracts or parcels and in such manner as in the opinion of the commission injuriously to affect the peace and welfare of the people of the Philippine Islands. To provide funds for this purpose the government was authorized to issue and sell their registered or coupon bonds, the proceeds of the sales of which were to be applied exclusively to the acquisition of property. By section 65 the lands were to be held, sold, and conveyed on such terms and conditions as the Philippine government might prescribe, subject to the limitations and conditions of the act.

A sinking fund was created embracing the moneys realized from sales or disposition of the said lands for the payment of the bonds at their maturity.

To be sure, provision was made for the protection of occupants and settlers by giving them preference in purchasing or leasing said lands; but these purchases were in recognition of rights vested before the lands were acquired, and were on a different basis from the preemption purchases by occupants and settlers upon the condition of occupancy, improvement, and cultivation.

The Philippine Commission enacted a law, April 26, 1904, (Public Laws, v. 3, p. 312), "for the administration and temporary leasing and sale of certain haciendas and parcels of land, commonly known as "friar lands," for the purchase of which the government of the Philippine Islands has recently contracted, pursuant to the provisions of sections sixty-three, sixty-four, and sixty-five of an act of the Congress of the United States entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," approved on the 1st day of July, 1902."

This act fully provided for carrying into effect the act of Congress in the acquisition of the friar lands. It appears that the lands were purchased and the bonds issued in conformity with the conditions in these statutes.

One of the recitals in the Philippine act, after stating the terms of the act of Congress, is that "whereas the said lands are not 'public lands' in the sense in which those words are used in the public land act, numbered nine hundred and twenty-six, and can not be acquired or leased under the provisions thereof, and it is necessary to provide proper agencies for carrying out the terms of said contracts of purchase and the requirements of said act of Congress with reference to the leasing and selling of said lands and the creation of a sinking fund to secure the payment of the bonds so issued."

The public-lands act was "general legislation" to carry out the provisions of sections 12, 13, 14, 15, and 16. The restrictions and limitations of those sections are specific and well defined. They apply to lands acquired by the treaty of peace with Spain. The citizens are limited, in their rights of purchase, to quantity, and to compliance with the requirements of occupancy and cultivation.

The purchase of the friar lands was made under the authority of the legislation herein recited. That authority was lawfully delegated to the Philippine government by Congress. The government has complete control over the sale of the lands "on such terms and conditions as it may prescribe," subject to the limitations and conditions provided for in the act of 1902.

All moneys realized from the issue and sale of the bonds authorized by the sections of the act recited herein must be applied to the acquisition of the property and to no other purpose. The moneys received from the sales and disposition of the lands constitute a trust fund for the payment of the principal and interest of the bonds and also a sinking fund for the payment of the bonds at maturity. There are conditions prescribed in the act of Congress and carried into the Philippine Commission act. The intention of Congress was to abolish a system of ownership disadvantageous to the Government; and, at the same time, to provide for the sale of the acquired property, so that the bonds issued for the purchase might not become a permanent burden.

I am of opinion that the limitations in section 15 do not apply to the estates purchased from religious orders under sections 63, 64, and 65 of the Philippine act.

Very respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

FEDERAL PRISONERS—ALLOWANCE FOR GOOD CONDUCT.

The right of a federal prisoner under the acts of June 21, 1902 (32 Stat. 397), and April 27, 1906 (34 Stat. 149), to a deduction from his term of imprisonment for good conduct, is dependent upon his complying with the conditions therein named. If he faithfully observes all the rules and has not been subjected to punishment, he is entitled to the credit specified; if not, he is entitled to no reduction whatever.

A prisoner who has violated the conditions named must serve his entire term unless the Attorney-General shall, in his discretion, restore to him all or a part of the time thus lost.

The record of conduct essential to entitle the prisoner to credit is not his record for any particular month or year, but for the entire term.

DEPARTMENT OF JUSTICE,
December 21, 1909.

SIR: I have the honor to acknowledge receipt of your communication of August 20, 1909, in which you ask my opinion upon the following state of facts:

Julius P. McDonough was convicted by court-martial of assault to kill, and on February 9, 1901, was sentenced to imprisonment for ten years, and is now serving his term in the Leavenworth Penitentiary. His record of conduct shows that on one or more occasions he violated the prison rules; but McDonough insists that, notwithstanding these violations, under the act of June 21, 1902 (32 Stat. 397), as amended by the act of April 27, 1906 (34 Stat. 149), he is entitled to credit for good behavior at the rate of ten days per month from the date of the last infraction of the rules to the expiration of his term of sentence; and you request my opinion as to the construction to be placed upon said act of June 21, 1902, with reference to the effect an infraction of the prison rules has upon the prisoner's right to a credit for good conduct.

Sections 1 and 2 of said act (omitting such portions of section 1 as are here immaterial) read as follows:

"That each prisoner who has been or shall hereafter be convicted of any offense against the laws of the United States, and is confined, in execution of the judgment or sentence upon any such conviction, in any United States penitentiary or jail, or in any penitentiary, prison, or jail of any State or Territory, for a definite term, other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence to be estimated as follows, commencing on the first day of his arrival at the penitentiary, prison, or jail: * * * Upon a sentence of ten years or more, ten days for each month. * * *

"SEC. 2. That in the case of convicts in any United States penitentiary, the Attorney-General shall have the power to restore to any such convict who has heretofore or may hereafter forfeit any good time by violating any existing law or prison regulation such portion of lost good

time as may be proper, in his judgment, upon recommendations and evidence submitted to him by the warden in charge. Restoration, in the case of United States convicts confined in state and territorial institutions, shall be regulated in accordance with the rules governing such institutions, respectively."

By said act of April 27, 1906, the above provisions were made applicable to the sentence under consideration.

The act of June 21, 1902, can admit of but one construction. The right of having time deducted from the term of imprisonment is conditional, the condition being that the prisoner shall have "faithfully observed all the rules and has not been subjected to punishment." If that condition be complied with, then, as a matter of right, he is entitled to the credit of time specified by the statute. But if the condition is broken, then he is entitled to no credit whatever.

However, in order that he may not be subjected to undue hardship and that the door of hope may not, by his misconduct, be entirely closed against him, the provisions of the second section were inserted, placing it within the discretion of the Attorney-General to allow the prisoner credit for such part of the time to which he would otherwise have been entitled, as to the Attorney-General may seem just and proper.

It is clear that good behavior for one month did not vest in the prisoner an unconditional right to a credit of ten days, and it is equally clear that the effect of an infraction of the rules was not limited to the credit to which he would otherwise have been entitled for the proportion of time which had already expired. The fact that the credit is to be estimated by the month does not indicate that a prisoner shall have any more right to a credit for one month than to credit for another. In fact, time is not earned and credit is not given by the month. The month is only a basis for the estimate, it being adopted as such because it is the most convenient basis. The "record of conduct" essential to entitle the prisoner to the credit is not his record for any particular month or year, but *for the entire term.*

The evil arising from any other construction is manifest. If misbehavior defeated only a credit for ten days per month for the time already expired, then one who has been in prison for but a few months would have practically no inducement to conduct himself properly, and the inducement to good conduct would increase as the term neared expiration; but if the credit is made to depend upon good behavior during the entire term the inducement is always the same, and this is unquestionably the effect Congress intended the act to have.

The prisoner McDonough was sentenced for ten years, or one hundred and twenty months. If his record were clear, his term of imprisonment would expire 1,200 days short of ten years; but inasmuch as his record shows that he has violated the prison rules the sentence will extend for the full term, unless the Attorney-General, in his discretion, shall restore to him all or a part of the time thus lost.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

EXECUTIVE ORDER OF JULY 5, 1906—CERTIFICATION TO CERTAIN POSITIONS CONNECTED WITH THE STATE, WAR, AND NAVY BUILDING.

Executive order of July 5, 1906, which directs the certification next after the eligibles entitled to preference under section 1754, Revised Statutes, of persons honorably discharged from the United States Navy as water tenders, oilers, and firemen, for the position of fireman in the State, War, and Navy building; persons honorably discharged as warrant machinists in the Navy for the position of chief engineer or assistant engineer; and persons honorably discharged as noncommissioned officers in the United States Army for the position of watchman in that building, is inconsistent with the provisions of the civil service act, and therefore without sanction of law.

DEPARTMENT OF JUSTICE,

December 22, 1909.

SIR: I have the honor to acknowledge the receipt of a communication from you in which you refer to an executive order of July 5, 1906, and request to know whether,

in my judgment, such an order was within the power of the President.

The executive order is as follows:

"In recognition of the fact that experience in the military and naval service peculiarly fits persons for appointment to certain positions in the State, War, and Navy Department building, the Civil Service Commission, upon request of the superintendent of that building, approved by the commission charged with the care of the building, will certify in their order, next after eligibles entitled to preference under section 1754, Revised Statutes, persons honorably discharged as water tenders, oilers, and firemen from the United States Navy for the position of fireman; persons honorably discharged as warrant machinists in the navy for the position of chief engineer or assistant engineer; and persons honorably discharged as noncommissioned officers in the United States Army for the position of watchman.

"THEODORE ROOSEVELT.

"THE WHITE HOUSE,

"*July 5, 1906.*"

The civil service act, approved January 16, 1883 (22 Stat. 403), was "An act to regulate and improve the civil service of the United States." It provides a commission "to aid the President, as he may request, in preparing suitable rules for carrying the act into effect." It was expressly enacted that the said rules shall provide and declare certain things. Among others it declared "for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder;" and "that such examinations shall be practical in their character, and, so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed." It also provided: "That all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among

those graded highest as the results of such competitive examination."

By section 1754, Revised Statutes, it is provided:

"Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices."

This exception was recognized in the seventh section of the civil-service act (22 Stat. 406), as follows:

"But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes."

This preference in favor of honorably discharged disabled persons in military or naval service is the only exception made by statute. It does not exempt those persons from liability to examination, but entitles them to a preference for appointment as against other persons of equal qualifications for the place. (17 Op. 194.)

In the executive order referred to me the Civil Service Commission is directed, upon request of the superintendent of the State, War, and Navy Department Building * * * to certify, next after eligibles entitled to preference under section 1754, persons, in certain classes, honorably discharged from the navy and army for positions in the civil service. This order does not relieve these persons from liability to examination, but establishes for them a preference over other persons of equal qualifications. It is, as it were, attached to section 1754 and enlarges and extends the preferential classes mentioned in that statute.

By section 1753, Revised Statutes, it is enacted:

"The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to con-

duct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service."

In section 7 of the civil-service act it is said: "Nothing herein contained shall be construed * * * to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section" of the Revised Statutes. This clause does not repeal section 1753, nor does it reenact that section. The statutes are *in pari materia*; they may be construed together. They constitute a legislative expression that the President is authorized to prescribe rules and regulations for the civil service which shall be in conformity to the provisions of the civil-service act.

The preference declared in section 1754 for certain persons discharged from the military or naval service excludes persons in these services not mentioned. The persons designated in the executive order are not in these classes. There is no act of Congress which gives them the preference. The fact that experience in the military and naval service fits them for appointment to certain positions may be and undoubtedly would be taken into account in the examination provided for in the second section of the civil-service act.

I am of opinion that an executive order giving these persons a preference for appointment is inconsistent with the provisions of the civil-service act, and therefore without the sanction of law.

Very respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

REGISTRATION IN PATENT OFFICE OF PRINTS DESIGNED
TO BE USED ON ARTICLES OF MANUFACTURE.

The copyright act of March 4, 1909 (35 Stat. 1075), did not relieve the Patent Office of its duty, and it is still required, to register all prints which have heretofore been registered therein under the act of June 18, 1874 (18 Stat. 78), and in the same manner as they have heretofore been registered.

DEPARTMENT OF JUSTICE,
December 22, 1909.

SIR: I have the honor to acknowledge receipt of your communication of the 10th instant, in which my opinion is asked with reference to the effect, if any, which the act of March 4, 1909 (35 Stat. 1075), entitled: "An act to amend and consolidate the acts respecting copyright," has upon the right of applicants to have registered in the Patent Office engravings, cuts, or prints designed to be used on other articles of manufacture.

It appears that different views have been taken with reference to the proper construction of this act by the Commissioner of Patents and the Librarian of Congress, the former insisting that by its terms his power to register in his office engravings, cuts, or prints of the character mentioned has been abrogated, and that if applicants still have the right to have such engravings, cuts, or prints registered it must be done in the office of the register of copyrights; while the latter contends that the register of copyrights is not authorized to register in his office any engravings, cuts, or prints which are designed to be used on articles of manufacture.

I think a careful consideration of the several acts of Congress relating to patents and copyrights will lead to a satisfactory solution of the question.

By the act of July 8, 1870 (16 Stat. 198), as appears from the caption of said act, Congress revised, consolidated, and amended the statutes then existing relating to patents and copyrights. The first 76 sections of this statute related exclusively to patents, while sections 85 to 110 related to copyrights. By section 71 of said act it was provided that any person who, by his own industry, genius, efforts, and expense has invented or produced (among other things) any new and original impression, ornament, pattern, *print*, or picture, to be painted, cast,

or otherwise placed on or worked into any article of manufacture, may, upon the payment of the duty required by law, and other due proceedings had, the same as in the case of inventions or discoveries, obtain a patent therefor.

By section 86, which is the second section relating to copyrights, it was provided that any citizen of the United States or resident therein who shall be the author, inventor, designer, or proprietor of any (among other things) *engraving, cut, print*, or photograph, or negative thereof, shall, upon complying with the provisions of this act, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same.

It will thus be seen that the word "print" was used in this act in connection with both things which might be patented and also those subject to copyright, but the distinction between the two characters of prints was clearly drawn by the clause in said section 71, which limited the prints that might be patented to those which were "to be placed on or worked into any article of manufacture."

In codifying this act section 71 was carried into the Revised Statutes, with slight verbal changes, as section 4929, in chapter 1 of title 60, which relates solely to patents, while section 86 was copied, with slight modifications, as section 4962, in chapter 3 of said title, which relates solely to copyrights, and thus the distinction between the two characters of prints was preserved with equal clearness in the Revised Statutes.

By the act of June 18, 1874 (18 Stat. 78), Congress amended the law relating to patents, trade-marks, and copyrights by, in section 1 thereof, providing that no person shall—

"maintain an action for infringement of his copyright unless he shall give notice thereof * * * for a print, cut, engraving, * * * by inscribing upon some visible portion thereof,"

certain statements therein set forth, and by the third section it was provided that in the construction of the act the words—

"engraving, cut and print shall be applied only to pictorial illustrations or works connected with the fine arts, and

no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office;" and the Commissioner of Patents was charged with the supervision and control of the entry or registry of such prints or labels, in compliance with such regulations as applied to the registry of copyrights, except that a fee of \$6 was to be paid instead of \$1 provided for registering a copyright.

Under the provisions of these two statutes, as interpreted by the Commissioner of Patents, two classes of patents were granted, one for inventions in an art, for a machine, a manufacture, or composition of matter, or any improvement thereon, and the other for ornamental designs placed upon or worked into and forming an inseparable part of articles of manufacture. And, in addition to these, the Commissioner of Patents entered for registration, "in conformity with the regulations provided by law as to copyright of prints," artistic prints which describe the article of manufacture to which it refers or is to be attached. Because these registrations were made in accordance with the copyright law, they were, by the Patent Office, designated "copyrights," although such designation was probably in a technical sense erroneous, as the act of 1874 expressly provided that such prints or labels should not "be entered under the copyright law," the sole distinction as to them being that they should be *entered in conformity with the copyright law*.

But the nomenclature of the right conferred by the registration of such prints can make no difference, as it is clear that the register of copyrights had nothing to do with such prints, that all proceedings relating thereto were conducted in the Patent Office, and that the law under which they were entered was a part of the laws under which that office was operated.

On May 9, 1902 (32 Stat. 193), Congress passed an act by which section 4929, Revised Statutes, was amended so as to read:

"Any person who has invented any new, original, and ornamental design for an article of manufacture, not known or used by others in this country before his invention thereof, and not patented or described in any printed pub-

lication in this or any foreign country before his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years, prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law and other due proceedings had, the same as in cases of inventions or discoveries covered by section forty-eight hundred and eighty-six, obtain a patent therefor."

As I understand, the Patent Office construed this amendment to apply solely to the second class of patents above described, and held that it did not affect the registration in that office of artistic prints to be placed on articles of manufacture. This construction was, in my opinion, correct, inasmuch as the act of July 18, 1874, was not incorporated in the Revised Statutes, they being only a codification of the laws enacted on or before December 1, 1873 (sec. 5601), and consequently said act of 1874 was not repealed by the amendment of May 9, 1902.

With the law in this condition, the act of March 4, 1909 (35 Stat. 1075), entitled "An act to amend and consolidate the acts respecting copyrights," was passed. The caption of this act clearly indicates that it was intended to relate solely to the subject of copyrights, and it was not intended to in any respect amend or affect the laws then existing relating to the registration of prints and labels in the Patent Office, and there is nothing in the body of the act which is in the least inconsistent with the caption. The words "prints" and "pictorial illustrations," used in clause (k), section 5, of said act, relate solely to prints and illustrations which were embraced in section 4952, Revised Statutes, and which may be copyrighted; and it does not follow that because no reference is therein made to prints or labels which are to be used for any other articles of manufacture such prints or labels can not be registered in the Patent Office precisely as could have been done previous to this act.

My attention is called to section 47 of said act, whereby it is provided that all records and other things relating to copyrights, required by law to be preserved, shall be kept and preserved in the Copyright Office, Library of Congress, District of Columbia, and shall be under the control of the

register of copyrights, who shall, under the direction and supervision of the Librarian of Congress, perform all the duties relating to the registration of copyrights; and it is suggested that by this section the previous laws relating to the registration of prints were so modified as to require all prints to be registered by the register of copyrights. However, this section is but a copy, with few verbal changes, of section 85 of the act of July 8, 1870, and section 4948, Revised Statutes, which referred alone to the record kept of copyrights in the Copyright Office, and this section by its express terms is likewise limited to such records and does not relate to records kept of prints entered in the Patent Office.

Nor can that clause in section 63 of said act which provides that "All laws or parts of laws in conflict with the provisions of this act are hereby repealed" have any effect upon the registration of prints in the Patent Office in accordance with the provisions of the act of June 18, 1874, because that part of said act which relates to the registration of prints in the Patent Office is not in conflict with the provisions of the act of 1909.

Furthermore, I do not think that the case of *Higgins v. Keuffel* (140 U. S. 428, 433) wherein the court defines what labels and prints are, under the Constitution, registerable in the Patent Office, has any bearing upon this question, as under said decision some prints may be thus registered, though intended for use as a label or mark upon a manufactured product, and it is such prints that are required by the act of 1874 to be registered in the Patent Office.

I am therefore of the opinion that the Patent Office is still required to register all prints which have heretofore been registered therein under the provisions of said act of June 18, 1874, and in the same manner as they have heretofore been registered.

Respectfully,

J. A. FOWLER,
Acting Attorney-General.

Approved:

GEORGE W. WICKERSHAM.

THE PRESIDENT.

CONTRACTS—WAIVER OF PERFORMANCE—INCREASED TARIFF DUTIES.

The Secretary of War has authority to refrain from compelling full performance of a contract for the delivery of 300,000 pairs of men's gloves, to be made in Germany, where, after a partial performance of the contract, an act of Congress increased the duty on the gloves 120 per cent. He should not, however, relieve the contractor with regard to gloves delivered or which should have been delivered prior to the taking effect of that act.

The Attorney-General does not concur in the view that executive officers are limited in matters of this kind wholly to considerations affecting the pecuniary interests of the Government.

DEPARTMENT OF JUSTICE,*December 22, 1909.*

SIR: Under date of the 9th instant you transmitted certain correspondence with the Secretary of War, presenting the question whether it is within the power of the Secretary to waive the performance of a contract made under the following conditions, as disclosed by said correspondence:

On July 30 last, the War Department entered into a contract with Mr. Robert W. Hilliard for the delivery by him of 300,000 pairs of men's cotton gloves, to be made in Germany. - Previous to this contract cotton gloves had never been specifically named in the tariff, and at the time of its execution such articles were dutiable under the provisions of the Dingley act relating to cotton wearing apparel. The department refused to allow a clause in the contract providing for a change in tariff rates, evidently sought in view of the fact that the tariff was then in process of revision by Congress. The bidder, it is said, thought he could safely assume that there would be no serious change in the existing law, or, if there was a change, that the duty would be lower, if anything. The new tariff act, however, which was approved August 5 last, imposed a duty specifically upon men's cotton gloves which increased the former rate 120 per cent, and, it is claimed, converted an estimated profit of 21 cents per dozen pairs into an actual loss of that amount.

Under the contract 34,666 pairs of gloves should have been delivered when the tariff act became effective, but not all of that amount was so delivered. The contract also

gave the Government the right to increase the amount of gloves ordered 50 per cent, and, on October 25, 1909, after the tariff act had gone into effect, notice was given to the contractor by the War Department that it desired 150,000 additional pairs of gloves as per this agreement.

It is stated by the Secretary of War that, if the contractor shall be compelled to complete his contract as stipulated, the increased cost to the latter on account of the change in tariff will be \$4,739.64 on the 265,334 pairs due on the original contract, and \$2,679.44 on the 150,000 pairs subsequently ordered.

The equitable considerations suggested by the above facts are, I am advised, fully appreciated by yourself and the Secretary of War, the only question being as to the authority of the Secretary to grant relief, either in respect to the delivery of the remainder of the 300,000 pairs of gloves originally ordered, or as to the 150,000 subsequently ordered.

It seems that the mere fact that the Government, by general law, has so changed the conditions under which a contract with it was to be performed as to injuriously affect the contractor would not invalidate the contract. Thus, in *Deming's case* (1 Ct. Cl. 190), the Court of Claims, in holding that a contractor could not recover for losses sustained by him through the performance of a contract which had been affected by a general law increasing duties, as in this case, said (p. 191):

"This statement of his case is plausible, but is not sound. And herein is its fallacy: that it supposes general enactments of Congress are to be construed as evasions of his particular contract. This is a grave error. A contract between the Government and a private party can not be *especially* affected by the enactment of a *general* law. The statute bears upon it as it bears upon all similar contracts between citizens, and affects it in no other way. In form the claimant brings this action against the United States for imposing new conditions upon his contract; in fact he brings it for exercising their sovereign right of enacting laws. But the Government entering into a contract stands not in the attitude of the Government exercising

its sovereign power of providing laws for the welfare of the State. The United States as a contractor are not responsible for the United States as a lawgiver."

The rule thus stated was extended to cases involving executive instead of legislative acts in Jones and Brown's case (1 Ct. Cl. 383, 384), it being held in that case that "whatever acts the Government may do, be they legislative or executive, so long as they be public and general, can not be deemed specially to alter, modify obstruct, or violate the particular contracts into which it enters with private persons." This view was followed in Wilson's case. (11 Ct. Cl. 513.)

Assuming this to be a correct exposition of the law on the subject, it is manifest that such a rule operates to place the individual at the mercy of the Government, and, as illustrated by the present case, in effect enables the Government to take private property for public use without just compensation. While, therefore, the general acts of the Government in its sovereign capacity may not affect government contracts specially, and, if the contract be performed, the contractor has no legal claim for recovery which the courts can recognize, but must look to Congress for relief, still this is far from saying that a contract so affected should be rigidly enforced by the officers of the Government charged with the making and execution thereof. However necessary the fiction may be as to the dual nature of the Government in matters of this kind, the fact remains that it profits by the entire transaction as a single entity at the expense of the contractor, and justice and fair dealing seem to require that the application of the rule be avoided if possible.

It has been said that, as a general rule, when a contract with the Government is fully consummated it must be executed according to its terms, and the officers of the Government representing it in the transaction have no authority to consent to a change or a modification thereof. (9 Op. 80; *id.* 103; 10 *id.* 476.) The later authorities, however, are conclusive upon the proposition that such a contract can be altered, modified, or suspended by such officers wherever such action is not prejudicial to the

interests of the United States, or is for its benefit, and not in contravention of law. (*United States v. Corliss Steam-Engine Company*, 91 U. S. 321; *Satterlee v. United States*, 30 Ct. Cl. 31; 15 Op. 481; 18 *id.* 101; 21 *id.* 207; 2 Comp. Dec. 182; 3 *id.* 54; 4 *id.* 38; 5 *id.* 83; 7 *id.* 92.)

In the Corliss case the Supreme Court said (91 U. S. 323):

“It would be of serious detriment to the public service if the power of the head of the Navy Department did not extend to providing for all such possible contingencies by modification or suspension of the contracts and settlement with the contractors.”

The later decisions rest upon the principle that express authority of law is not necessary for every administrative act, but the officers of the Government, and especially the heads of departments, although limited by law in the exercise of their powers, necessarily have a large discretion in the performance of their duties. (*United States v. Macdaniel*, 7 Pet. 1, 15; *In re Neagle*, 39 Fed. 833, 860.)

None of the authorities cited, however, present a situation precisely similar to the one we are considering. Those which deny the right of the executive officers to alter or rescind a contract, referred to cases where the enforcement of a contract had become more onerous than was anticipated by reason of occurrences for which the Government was in no wise responsible. Those in which the power to modify or suspend was sustained either involved considerations which made it for the pecuniary or material interests of the Government that such course be taken, or else the modification or suspension did not prejudice such interests.

The present case is anomalous in that it presents the question whether an executive officer has authority to waive the further execution of a contract because the action of the Government itself in its sovereign capacity makes it inequitable to enforce it and where the waiver would be prejudicial to the *pecuniary* interests of the United States, since, if the contract in question were suspended, the Government would have to pay more for the articles contracted for, although no more than it really

ought to pay in view of the altered circumstances. While the question is not free from doubt, I feel constrained to hold that the Secretary has such authority and that the equity which has been created by the action of the Government itself forms a sufficient justification for the suspension of the contract. I am unable to concur in the view that executive officers are limited in matters of this kind wholly to considerations affecting the pecuniary interests of the Government. In my opinion the honor of the nation is of greater importance. As stated by Judge Taney when Attorney-General, there is nothing in the nature of our institutions which requires officers of the Government to perpetrate an act of injustice in the name of the United States. (2 Op. 482.) On the contrary, I think the principles of morality underlying our republican form of government are such as to make it the duty of executive officers, so far as possible, to avoid working wrong or injustice to the people. In the present case it is manifest that the enforcement of the contract in question would simply cause a wrong which Congress would have to be called upon to right. Such enforcement would, therefore, expose the Government to merited reproach.

As bearing upon the right and duty of Congress to reimburse the contractor in the exigency suggested the opinion of the Supreme Court in *United States v. Realty Company* (163 U. S. 427) is instructive. In that case the court affirmed the constitutionality of an appropriation made by Congress to reimburse certain manufacturers and producers of sugar who had complied with the provisions of the sugar-bounty law of 1890, which was repealed before they had received its benefits and which was alleged to be unconstitutional. Referring to the grant of power to Congress to lay and collect taxes, etc., "to pay the debts" of the United States, the court, speaking by Mr. Justice Peckham, said (p. 440):

"What are the debts of the United States within the meaning of this constitutional provision? It is conceded and indeed it can not be questioned that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly

legal character. The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the Government which are thus founded."

The view expressed by Judge Taney as to what is required by the nature of our institutions in matters of this kind was concurred in by Attorney-General Stanberry, in an opinion rendered in 1867 (12 Op. 112), wherein he held that the Secretary of the Navy could waive a forfeiture stipulated in a contract with his department in a case where the contractors had acted in entire good faith and the delay in the execution of the work was occasioned by unexpected misfortune. While the equity referred to in that case did not arise out of the action of the Government itself, the same principle which was there invoked to sustain the action of the Secretary is assuredly applicable in cases where the contractor's plight is the result of the exercise by the Government of its sovereign power after the making of the contract.

It follows from the views above expressed that, in my opinion, the Secretary of War has authority, under the circumstances of this case, to relieve Mr. Hilliard from the further performance of his contract as to gloves required to be delivered after the tariff act became effective, both under the original and the supplementary orders. As to the gloves delivered or which should have been delivered prior to the taking effect of the act, Mr. Hilliard has, of course, no claim for relief, and I do not understand that he makes such a claim.

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

**BONDS OF SURETY COMPANIES DOING BUSINESS IN STATES
WHERE THEY ARE NOT AUTHORIZED.**

Bonds of surety companies executed in States in which they are not licensed, for principals residing in those States or for contracts to be performed therein, are valid and enforceable against such companies, no matter how flagrant their violations of the law of the State may have been as regards failure to qualify to do business in the State.

The execution of a bond by a surety company at its home office, or outside of the boundaries of a State wherein it is not licensed, for a principal residing in such State or for a contract to be performed there, would not be the doing of business by the surety within the State.

The question whether or not in either such case the Treasury Department should accept such bonds is one of administrative policy, regarding which the Attorney-General can not properly express an opinion.

DEPARTMENT OF JUSTICE,

December 24, 1909.

SIR: I have your letter of December 10 setting forth certain previous correspondence concerning the acceptance of sureties under the act of Congress of August 13, 1894 (28 Stat. 279), and adding:

"The correspondence in the matter has been referred to the Solicitor of the Treasury for his opinion, a copy of which, dated December 3, 1909, is herewith inclosed.

"The two important conclusions reached by the Solicitor are as follows:

"First. That the bonds of surety companies executed in States in which they are not licensed, for principals residing in such States or for contracts to be performed therein, 'are valid and enforceable against them (the surety companies) no matter how flagrant their violations of the law of the State may have been in respect to their failure to qualify themselves to do business within the State.' However, he does not advise the acceptance of bonds so executed.

"Second. That the execution of a bond by a surety company at its home office or outside of the boundaries of a State wherein it is not licensed, for a principal residing in such State or for a contract to be performed therein, 'would not be a doing business by the surety company in the State * * * and hence is not forbidden by the laws of the State; and that I see no reason why the depart-

ment should not accept bonds of surety companies executed under the circumstances proposed in your inquiry.'

"I have, therefore, the honor to request your opinion as to the correctness of the Solicitor's conclusions in the premises."

In reply thereto I beg to advise you that neither of the two questions above referred to has been heretofore presented to the Attorney-General or considered by him in any previous opinion. The question as to whether or not a contract of suretyship executed between a bonding company and the Government in a State in which the company was without authority to do business would be binding and enforceable was expressly mooted and not answered in the opinion of October 28, 1909 (28 Op. 35), for the reason that it was not involved in the inquiry at that time. The question as to whether or not the execution of a bond by a surety company outside the boundaries of a State wherein it is not licensed, for a principal residing in such State, or for a contract to be performed therein, would constitute the "doing of business" within such State, was not considered in such previous opinion for the reason that the facts as then submitted concerned only the execution of a bond within a State for the faithful performance of a contract within such State by a surety company not authorized to do business therein.

Answering now the two questions examined by the Solicitor of the Treasury it seems quite clear, first, that the contract of suretyship referred to would be valid and enforceable against the company; and, second, that the execution of a bond in the manner supposed would not be the doing of business within the State.

As to whether or not in either such case the department should accept such bonds (assuming the Secretary of the Treasury is otherwise authorized) is a matter of administrative policy in which the Attorney-General can not properly interfere.

Very respectfully,

WADE H. ELLIS,
Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

PAYMASTER'S CLERK IN THE NAVY—STATUS TRAVELING HOME.

The Attorney-General declines to express an opinion upon the question whether a paymaster's clerk in the Navy retains his status as such clerk while traveling home under orders received prior to the revocation of his appointment, for the reason that the question is hypothetical in its nature.

The validity of article 1367 of the Naval Regulations as applied to cases arising in the future can not properly be considered.

The rule is well established that the Attorney-General will not, except in matters of great importance, express an opinion upon any question involving the payment of money which should ordinarily be referred to the Comptroller of the Treasury for decision.

DEPARTMENT OF JUSTICE,

December 23, 1909.

SIR: Under date of the 3d instant you request my opinion as to whether a paymaster's clerk in the navy, upon completing duty abroad retains his status as such clerk while traveling home under orders prior to the revocation of his appointment, and whether article 1367 of the Navy Regulations is a valid regulation.

Paymasters' clerks in the navy are authorized by sections 1386, 1387 and 1388 of the Revised Statutes. Article 1367 of the Navy Regulations provides:

"When a pay officer is detached from a ship abroad, thereby involving also the detachment of his clerk, the pay of the latter, without commutation of rations, shall be continued after his detachment and settlement of accounts for the time necessary to enable him to reach, by the shortest and most direct route, the place in the United States which he left under his appointment."

In regard to this matter you say:

"The practice of the department has been to order a paymaster's clerk, upon the completion of his duty abroad, to proceed to his home in the United States, his appointment to be considered as revoked upon his arrival there, and article 1367 above quoted provides that his pay shall continue during the period of travel.

"In a recent case, however, where a paymaster's clerk serving on a vessel in Philippine waters was directed, upon

the detachment of the pay officer with whom he was on duty, to assist such officer in settling his accounts and then to proceed to his home in the United States, it was held by the Comptroller of the Treasury (decision July 29, 1909, affirmed September 29) that the allowance of pay to the clerk during the period of travel home was not authorized, and the opinion was expressed that article 1367 of the Navy Regulations, in purporting to 'extend the term and pay' beyond the time allowed for settling accounts, contravenes the law.

"If the view of the Comptroller that 'with the completion of the duties of the paymaster the clerk's tenure of office ceases' and he is no longer under the law a paymaster's clerk, although his appointment has not been revoked, is correct, the Navy Regulations would appear to require modification, as would also the practice of treating the clerk, until his appointment is revoked, as an officer of the navy, subject to orders and to naval laws and regulations."

Under the circumstances disclosed by your letter, I do not deem it proper to express an opinion upon the questions presented. In the first place, your inquiry as to the status of a paymaster's clerk while traveling home under orders prior to the revocation of his appointment, presents a hypothetical question, no actual case being cited. Such questions the Attorney-General has uniformly declined to answer. (20 Op. 288; 22 *id.*, 77; 24 *id.*, 118.) The question as to the validity of article 1367 of the Navy Regulations as applied to cases that may arise in the future is also hardly a proper subject for me to pass upon. (20 Op. 738.)

But assuming that a concrete case requiring the determination of these questions could be presented, there is still another reason why I should refuse to render an opinion on the subject. Underlying both your inquiries is the question as to the pay of paymasters' clerks, which, it appears, the Comptroller of the Treasury, in pursuance of authority conferred upon him by law, has already decided. It is a well-established rule of this office that, in view of section 8 of the act of July 31, 1894 (28 Stat. 162,

208), questions of this character should ordinarily be referred to the Comptroller of the Treasury, and, except in matters of great importance, the Attorney-General will decline to express an opinion upon any question which might be so referred. (21 Op. 188, 530; 22 *id.*, 581; 23 *id.*, 1; 25 *id.*, 185, 301, 370.) In the opinion last cited, Attorney-General Moody discusses the rules of law and propriety bearing upon this subject. In no case, so far as I am advised, has the Attorney-General undertaken to review a matter which has been before the Comptroller without being advised that it would be entirely agreeable to the latter to do so. In the present case there is no intimation of this sort, nor should I be disposed to think, in the absence of an opinion by the Comptroller on the subject, that the question referred to, if presented in an actual case, would be of sufficient importance to justify a departure from the general rule as to the reference of such questions to the Comptroller.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

COMMISSIONERS OF DEEDS FOR THE DISTRICT OF COLUMBIA—DISQUALIFICATION AS PENSION ATTORNEYS.

Commissioners of deeds for the District of Columbia are prohibited under the provisions of sections 109 and 113 of the Criminal Code of the United States (35 Stat. 1088) from acting as agents or attorneys in the prosecution of pension claims against the United States.

Such commissioners are officers of the United States within the meaning of the above quoted sections of the Criminal Code.

DEPARTMENT OF JUSTICE,

January 10, 1910.

SIR: Under date of November 29, 1909, you submitted for my consideration a letter from Messrs. Shapiro and Shapiro, attorneys at law, of Bridgeport, Conn., in which they inquire whether the appointment by President Roosevelt, on December 7, 1907, of Mr. Joseph G. Shapiro as commissioner of deeds for the District of Columbia,

resident in Connecticut, for a period of five years from that date, disqualifies him from acting as an attorney in the prosecution of pension claims against the Government.

Sections 109 and 113 of the Criminal Code of the United States, effective January 1, 1910 (35 Stat. 1088), are a reenactment of the provisions of sections 5498 and 1782 of the Revised Statutes, and read as follows:

"SEC. 109. Whoever, being an officer of the United States, or a person holding any place of trust or profit, or discharging any official function under, or in connection with, any executive department of the Government of the United States, or under the Senate or House of Representatives of the United States, shall act as an agent or attorney for prosecuting any claim against the United States, or in any manner, or by any means, otherwise than in discharge of his proper official duties, shall aid or assist in the prosecution or support of any such claim, or receive any gratuity, or any share of or interest in any claim from any claimant against the United States, with intent to aid or assist, or in consideration of having aided or assisted, in the prosecution of such claim, shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both.

"SEC. 113. Whoever, being elected or appointed a Senator, Member of or Delegate to Congress, or a resident commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, or being the head of a department, or other officer or clerk in the employ of the United States, shall, directly or indirectly, receive, or agree to receive, any compensation whatever for any services rendered or to be rendered to any person, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever, shall be fined not more than ten thousand dollars and imprisoned not more than two years; and shall, moreover, thereafter be incapable of holding any office of honor, trust, or profit under the Government of the United States."

With reference to commissioners of deeds and notaries public, the Code of the District of Columbia, approved March 3, 1901 (31 Stat. 1189), provides:

"SEC. 557. Commissioners of deeds.—The President of the United States is authorized to appoint as many commissioners of deeds throughout the United States as he may deem necessary, with power to take the acknowledgment of deeds for the conveyance of property within the District, administer oaths, and take depositions in cases pending in the courts of said District in the manner prescribed by law; to whose acts, properly attested by their hands and seals of office, full faith and credit shall be given.

"SEC. 558. Notaries.—The President shall also have power to appoint such number of notaries public, residents of said District, as, in his discretion, the business of the District may require.

"SEC. 559. Tenure of office.—Said commissioner of deeds and notaries public shall hold their offices for the period of five years, removable at discretion."

These sections are a substantial reenactment of section 5 of the act of June 7, 1878 (20 Stat. 100, 101).

An act approved June 29, 1906 (34 Stat. 622), amends these provisions so far as notaries are concerned, and provides:

"That the appointment of any person as such notary public, or the acceptance of his commission as such, or the performance of the duties thereunder, shall not disqualify or prevent such person from representing clients before any of the departments of the United States Government in the District of Columbia or elsewhere, provided such person so appointed as a notary public who appears to practice or represent clients before any such department is not otherwise engaged in government employ, and shall be admitted by the heads of such departments to practice therein in accordance with the rules and regulations prescribed for other persons or attorneys who are admitted to practice therein: *And provided further*, That no notary public shall be authorized to take acknowledgments, administer oaths, certify papers, or perform any official acts in connection with matters in which he is em-

ployed as counsel, attorney, or agent or in which he may be in any way interested before any of the departments aforesaid."

Reporting this amendment favorably, the Senate Committee on the District of Columbia (Senate Rep. 4012, 59th Cong., 1st sess.) said:

"Section 5498 of the Revised Statutes excludes inferior officers of the United States from practicing before the departments. Notaries public are appointed by the President under the act of Congress approved June 7, 1878, and are, therefore, under the decision of *The United States v. Germaine* (99 U. S. 509), inferior officers. They are therefore prohibited from practicing before the departments even though they are lawyers of high standing."

That notaries public are officers of the United States, and therefore prohibited from practicing before the departments, was apparently in accordance with the views of the Secretary of the Interior, the United States attorney for this District, and others, as expressed in letters printed with the report of the Senate committee.

At the time the bill passed the House, Representative Bartlett said (40 Cong. Rec., 6839):

"It simply proposes to amend the law which prevents notaries public from practicing law or representing their clients in the Court of Claims or before any of the departments. * * * I drew the bill myself. * * * As the law stands, or as it has been construed by the Secretary of the Interior and other heads of departments, the fact that a person is simply a notary public and holding no other office prevents him from representing anyone before the departments or the Court of Claims. * * * The purpose of this bill, and its sole purpose, was to permit members of the bar who are notaries public to represent their clients in the Court of Claims, for instance. * * * In other words, it grows out of the fact that the Secretary of the Interior and other heads of departments have decided—and I think, maybe, properly—that a notary public in the District of Columbia was an officer of the Government. * * *"

There has been no such amendment of the provisions of the code as to commissioners of deeds. If notaries public were properly held to be officers of the United States within the meaning of section 5498 of the Revised Statutes, it would seem to follow that commissioners of deeds are also.

In *United States v. Hartwell* (6 Wall. 385, 393), the court laid down the following rules for the purpose of determining what constituted an officer of the United States, referring specifically to a clerk to an assistant treasurer of the United States:

“An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties

“The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe.”

In *United States v. Germaine* (99 U. S. 508, 509), the court said:

“The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.”

In that case a civil surgeon appointed by the Commissioner of Pensions, pursuant to law, to examine pensioners

and applicants for pensions, was held not to be an officer of the United States, both on the ground that the Commissioner of Pensions was not the head of a department, and because of the occasional and intermittent nature of the duties of such surgeon, the court also pointing out that he was required to keep no place of business for public use, gave no bond, and took no oath.

A notary public has been described in judicial decisions as a "public officer" (*Britton v. Niccolls*, 104 U. S. 757, 766), "an officer long recognized throughout the commercial world" (*The Gallego*, 30 Fed. 271, 274; *Pierce v. Indseth*, 106 U. S. 546, 549), and as "a public officer, recognized as such by the common law, the civil law, and the law of nations" (*Bank v. Hopkins*, 8 D. C. App. 146, 152).

In *Bettman v. Warwick* (108 Fed. 46, 48) the Circuit Court of Appeals for the Sixth Circuit held that a notary public, appointed under the laws of a State by the governor, was a state officer, and that he was "no less a government official because paid by fees for services rendered than if paid a stipulated salary out of the treasury of the State."

The duties of commissioners of deeds for the District of Columbia are similar to those of notaries public. They have authority "to take the acknowledgment of deeds for the conveyance of property within the District, administer oaths and take depositions in cases pending in the courts of said District in the manner prescribed by law." "Tenure, duration, emolument and duties" are incidents of their employment, although their duties are occasional and intermittent, rather than continuing and permanent. Congress, with authority to vest in the President "the appointment of such inferior officers as they may think proper" (Const., Art. II, sec. 2), has authorized their appointment by the President, who is required (*id.*, sec. 3) to "commission all the officers of the United States." Commissioners of deeds and notaries public are, I am advised, so commissioned.

The Code of the District of Columbia, section 561, requires notaries public, before entering upon the duties of that office, to take "the oath prescribed for civil officers in

the District of Columbia," and "to give bond to the United States in the sum of two thousand dollars," but it contains no such provisions as to commissioners of deeds. Such commissioners are required, however, by this department to take the oath prescribed for officers of the United States. (Const., Art. VI; Rev. Stats., sec. 1757.)

It may be suggested that, because their duties concern only local matters, notaries public or commissioners of deeds are officers of the District of Columbia rather than of the United States. The Supreme Court, however, has held that a justice of the peace for the District of Columbia, whose functions are likewise confined to this District, is an officer of the United States. (*Marbury v. Madison*, 1 Cranch, 137; *Wise v. Withers*, 3 Cranch, 331.)

While there may be some ground for saying that commissioners of deeds and notaries public for the District of Columbia are not officers of the United States within the meaning of the above-quoted sections of the Criminal Code, in view of the circumstances above detailed as to notaries public and the ruling of the Supreme Court as to justices of the peace for the District of Columbia, I feel constrained to hold that commissioners of deeds are within the prohibition of those sections, leaving it to Congress to make an exception as to them similar to that made as to notaries public, if it should deem such action advisable.

In reaching this conclusion, I am not unmindful of the fact that the act authorizing the appointment of commissioners of deeds and notaries public was first passed in 1878, and that no question was apparently made as to the right of such officers to practice before the departments until after the enactment of the Code for the District in 1902. But, even if we can properly assume that such officers did practice before the departments during that time, this, although entitled to some consideration, would not be controlling, as the matter seems to have passed entirely *sub silentio*, and when the question was made it was decided against the right.

It follows that, in my opinion, Mr. Shapiro, while he retains the office of commissioner of deeds, can not properly

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act as an agent or attorney in the prosecution of pension claims against the United States, such claims being clearly embraced by the statutes mentioned.

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

CORPORATION TAXES—GROSS INCOME—INTEREST ON
UNITED STATES BONDS.

In computing the amount of the gross income of corporations subject to the tax provided by the act of August 5, 1909 (36 Stat. 11, 112), the interest received on its United States bonds should, under the provisions of section 38 of that act, be included.

Such interest should not be deducted from the gross income of the corporation for the purpose of ascertaining the net income, to be used as a basis for computing the amount of the taxes to be paid.

DEPARTMENT OF JUSTICE,

January 13, 1910.

SIR: I have the honor to acknowledge receipt of your communication of December 23, 1909, in which you request my opinion as to whether or not under section 38 of the act of August 5, 1909 (36 Stat. 112), corporations subject to the tax provided for therein should include in the returns required to be made, as a part of their gross income, the interest on United States bonds held by them, and in reply thereto will say:

By section 38 of said act it is provided: First, that the corporations specified therein "shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to 1 per centum upon the entire net income over and above five thousand dollars received by it *from all sources* during such year, exclusive of amounts received by it as dividends upon stock of other corporations," etc.; second, that the net income of a corporation shall be ascertained by deducting from the gross amount of the income: (First) The expenses described; (second) losses described; (third) interest paid on its indebtedness, not exceeding the paid-up capital, and in case of banking and trust companies interest paid

on deposits; (fourth) all sums paid within the year for taxes, and (fifth) amounts received within the year as dividends upon the stock of other corporations subject to the tax imposed; and, third, that there shall be deducted from the net income of such corporation, ascertained as provided, the sum of five thousand dollars, and the tax shall be computed upon the remainder of said net income.

The tax here imposed is not a tax upon the property of the corporation, but is specifically designated as "a special excise tax with respect to the carrying on or doing business by such corporation." That is, it is in the nature of a tax imposed upon the privilege of carrying on the business; and the net income, ascertained as described, was adopted by Congress only as a basis for computing what the amount of the assessment should be.

In the passage of this act, Congress doubtless had in mind the decision of the Supreme Court in the case of *Pollock v. Farmers' Loan and Trust Company* (157 U.S. 429), known as the income-tax case; and it was no doubt its intention to avoid every character of taxation that might be regarded as a direct tax; and, consequently, it carefully avoided imposing a tax upon the property of the corporation, or upon its income, and fixed and designated it as a tax upon the carrying on or doing of its business.

Furthermore, the act is specific in its terms and enters into minute details with reference to how the net income of the corporation, for the purpose of fixing the amount of the tax, shall be computed; and this particularity necessarily excludes the intention that any other provision can, by implication, be read into the act.

I am therefore of the opinion that in computing the amount of the gross income, corporations owning United States bonds should include the interest received thereon, and that such interest should not be deducted from the gross income for the purpose of ascertaining the net income which serves as a basis for computing the amount of taxes to be paid.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

140 *Corporation Taxes—Net Income—Dividends.*

CORPORATION TAXES—NET INCOME—DIVIDENDS FROM
CORPORATION HAVING NET INCOME LESS THAN \$5,000.

In computing the net income of a corporation under section 38 of the act of August 5, 1909 (36 Stat. 112), known as the "corporation tax law," the dividends received by it as a stockholder of any other corporation of a character to which that act applies should be deducted from its gross earnings, regardless of the amount of the net income of such dividend-paying corporation.

DEPARTMENT OF JUSTICE,
January 24, 1910.

SIR: In reply to your communication of January 15, 1910, in which you ask my opinion whether under section 38 of the act of August 5, 1909 (36 Stat. 112), known as the "corporation-tax law," in computing its net income, a corporation may deduct from its gross income dividends received by it from another corporation of a class to which the act is applicable, but which does not have a net income to exceed \$5,000, I have the honor to say:

Those parts of the act which bear upon this question are as follows:

"That every corporation * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company, equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed: * * * *Provided, however,* That nothing in this section contained shall apply to labor, agricultural or horticultural organizations, or to fraternal beneficiary societies, orders, or associations operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations, and dependents of such members, nor to domestic building and loan associations, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, or educational purposes, no part of the net income of which

inures to the benefit of any private stockholder or individual.

"Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation * * * (fifth) all amounts received by it within the year as dividends upon stock of other corporations, joint stock companies or associations, or insurance companies, subject to the tax hereby imposed * * *.

"Third. There shall be deducted from the amount of the net income of each of such corporations, joint stock companies or associations, or insurance companies, ascertained as provided in the foregoing paragraphs of this section, the sum of five thousand dollars, and said tax shall be computed upon the remainder of said net income of such corporation * * * for the year ending December thirty-first, nineteen hundred and nine, and for each calendar year thereafter * * *."

The question is whether or not a corporation whose net income does not exceed \$5,000, and which, therefore, pays no tax under this statute, is a corporation "subject to the tax" thereby imposed within the meaning of the act.

When the language of the act is considered, together with the clear intent of those who drafted its provisions, I think there can be no doubt about the answer that should be given to this inquiry. The act expressly declares that every corporation of the kinds mentioned "shall be subject to pay annually a special excise tax," and then provides a method for the computation of the amount to be paid. Therefore, every one of such corporations falls within the provisions of the act, and must make out a report of its business, as therein required, and in every respect comply with its terms. It may turn out when the calculation is made on the basis specified that no tax will be assessed against it, not because the corporation is not subject to the tax, but because its earning capacity is not sufficient to necessitate its imposition for that year, just as every male person within certain ages may be subject to draft during the time of war, yet the conditions necessitating the draft may never arise.

This manifest meaning of the language is clearly in accord with the legislative intent. The purpose was to exclude

\$5,000 of a corporation's earnings from consideration in estimating the amount of taxes which it should pay, and, further, that such \$5,000 should remain exempt from such estimate, though it should pass by way of a dividend into the hands of other corporations, just as it was the intention that when any part of a corporation's earnings had once entered into an estimate, as a result of which taxes were imposed, such sum should not again be considered in determining the amount to be paid by another corporation.

The effect of the contrary construction shows that such must have been the purpose of this provision. For, suppose a corporation holds 50 per cent of the capital stock of two corporations, one of which has a net income of exactly \$5,000 and declares a dividend of that amount, while the other has a net income of \$5,500, which it disburses as dividends. According to the theory that the first of these dividend-paying corporations is not subject to this tax, while the second one is, the corporation holding their stock can not deduct any part of the dividends received from the first corporation in estimating its net income, but can deduct of that received from the second one, not only the \$250, the 50 per cent of the excess over the \$5,000, which was deducted from the gross income of such corporation, but also the \$2,500, the 50 per cent of the \$5,000 deducted. That is, according to this theory, the \$5,000 which must be deducted from a corporation's gross income can not be deducted in the hands of other corporations which have received it as dividends when the first corporation has a net income of \$5,000 or less, but it can be deducted if such corporation has a net income of over \$5,000.

No such result was intended by Congress, and I am clearly of the opinion that the dividends received by a corporation as a stockholder of any other corporation of a character to which the act applies should be deducted from its gross income, regardless of the amount of the net income of such dividend-paying corporation.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

**CAMP HANCOCK—TRANSFER FROM WAR DEPARTMENT TO
DEPARTMENT OF AGRICULTURE.**

The President is without authority to transfer the military post, Camp Hancock, at Bismarck, N. Dak., or any portion thereof, from the War Department to the Department of Agriculture.

Lands reserved for military purposes can not be transferred to any other department without an act of Congress.

DEPARTMENT OF JUSTICE,

January 24, 1910.

SIR: I have the honor to respond to your direction, through your secretary, under date of January 18, 1910, for my opinion as to the legality of the proposed transfer from the War Department to the Department of Agriculture of the military post, Camp Hancock, at Bismarck, N. Dak. From the papers transmitted, the case is, in substance, this:

On August 9, 1872, by virtue of an order of the commanding officer of the Department of Dakota, there was established at Bismarck, N. Dak., a military post, to be known as Camp Hancock.

The site was used by the Government for military purposes to April 16, 1894, when—the premises being no longer needed for military purposes—they were, by order of the Secretary of War, turned over to the Weather Bureau, of the Department of Agriculture, which has remained in continuous possession to the present time. Congress has since appropriated money for making repairs and improvements to the buildings on the premises aggregating about \$10,000.

The occupation by the Weather Bureau has been at the sufferance only of the War Department, and the Secretary of Agriculture now asks for an executive order transferring this site to that department for the use of the Weather Bureau at that station. The War Department sees no objection to this transfer, if it can be legally made, and the question submitted is as to the power of the President to do this.

It does not appear that there has ever been any specific formal reservation of this site for military purposes; but the order of the general in command of that department

must have been approved by the Secretary of War, which would be the presumed approval of the President; and the same may be said of the continued occupation of the site as a military post and of the order of the Secretary of War giving the use of the site and buildings to the Weather Bureau. From all this but one conclusion is permissible, namely, that however informally done, the President, by his approval of these orders and this use and occupation, has sufficiently reserved this site for military purposes and so as to segregate it from the public lands which are open to sale.

That the President has power to make such reservations has been recognized from an early period. Thus, in *Grisar v. McDowell* (6 Wall. 363), it is said, p. 381:

“* * * from an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.”

The court then cites several instances of the express recognition by Congress of this power of the President to make such reservations, and there have been several later ones, but it is not necessary to extend the list.

In 17 Op. 258, Attorney-General Brewster said, page 259:

“It appears from these authorities that not only has the President the power to make reservations of public lands for public uses, but if the reservations are made by the heads of departments it will be presumed that the President has acted through them.”

The power to thus reserve public lands and appropriate them to military purposes does not necessarily include the power to either restore them to the general public domain or transfer them to another department. This department has repeatedly held that lands reserved for military purposes can not be restored to the public domain without an act of Congress. (10 Op. 359; 16 Op. 121; 17 Op. 168.) It would also seem that they can not be transferred to another department.

But independently of such general considerations, an act of Congress, not referred to in the papers transmitted, would seem conclusive of the question.

The first section of the act of July 5, 1884, 23 Stat. 103, is as follows:

“That whenever, in the opinion of the President of the United States, the lands, or any portion of them, included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof.”

The succeeding sections provide minutely for the survey and division of such lands into small tracts and for their appraisalment and sale for not less than a fixed minimum sum and for the protection of bona fide settlers thereon.

While there are special acts for the disposition of such reserved lands in particular named posts or places, the one cited above appears to be the only general act providing for the disposition of such reserved lands when no longer needed for military purposes, and the only one applicable here, I think, provides the imperative and only disposition of such lands.

Independently of the statute above referred to, there is another objection to the order asked for. The promulgation of such an order would be the exercise by the President of the power to take from one department of the Government that which is by law expressly appropriated to and for the exclusive use of that department and transfer it to another for which it was never intended. Such power can exist or be exercised only by express authority of Congress. With exceptions similar to that above mentioned, as to the President's power to reserve portions of land, Congress has uniformly adopted the policy of making separate and distinct appropriations for each of the executive departments, with its various bureaus and divisions. No power has been conferred upon the President to inter-

ferre with this policy or to transfer to one department a portion of that which is by law appropriated to or for another department.

Nor does it make any difference with this question of power that the department from which this is taken has no longer any need for it and does not object to the transfer. I quite agree with the Secretary of Agriculture that, for many reasons, this holding of quarters for the Weather Bureau at any of its stations at the mere sufferance of another department is most undesirable, and that such premises should be under the permanent and absolute control of his department. But if any change from the present conditions is desired, I think it must come from Congress and not from the President.

I have, therefore, the honor to advise you against a promulgation of an executive order for the transfer of Camp Hancock, or any portion thereof, to the Department of Agriculture.

As requested, I return herewith the papers sent me by your secretary.

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

**MUNICIPAL ELECTIONS ARE NOT GENERAL ELECTIONS—
NATURALIZATION ACT.**

Municipal elections held through the State of Pennsylvania do not constitute a general election within the meaning of section 6 of the naturalization act of June 29, 1906 (34 Stat. 596, 598), which provides that "no person shall be naturalized * * * within thirty days preceding the holding of any general election."

DEPARTMENT OF JUSTICE,

January 27, 1910.

SIR: I have received your letter of the 15th instant, in which my opinion is requested as to whether the municipal elections to be held throughout the State of Pennsylvania during the month of February next constitute a general election within the meaning of section 6 of the naturalization act of June 29, 1906 (34 Stat. 596, 598).

It is manifest that the question presented is one ultimately for the determination of the courts, and it is a rule of this office to decline to render opinions upon judicial questions. (19 Op. 670; 20 Op. 618; 21 Op. 369; *ib.* 557.) But as it appears to be of considerable importance for your department to know what attitude to adopt upon this question in the administration of the naturalization law, as your examiners now largely represent the United States before the courts at the hearings of petitions for naturalization, I feel that a departure from the general rule referred to is justified in this instance.

The section referred to, in so far as it is pertinent to the consideration of the subject of your inquiry, is as follows:

"SEC. 6. That petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition: *Provided*, That no person shall be naturalized nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any general election within its territorial jurisdiction."

The commission on naturalization appointed by executive order of March 1, 1905, in its report to the President stated that "no motive to naturalization has been so productive of fraud as the desire to vote. * * * Aliens are sought out by unscrupulous political agents and are paid for the votes they are expected to cast. * * * While some of the aliens who are thus bribed are entitled to naturalization, except for their moral character being bad, those who are not do not hesitate to make the statements and produce the evidence necessary to procure a certificate of naturalization from a court which is not scrupulous in examining the cases before it."

The commission included as a part of its report a draft of a bill which provided, in respect to the naturalization of aliens immediately preceding elections, "that no person shall be naturalized, nor shall any certificate of naturaliza-

tion be issued by a court within thirty days next preceding the holding in the district of a congressional or presidential election." Congress adopted the idea but enlarged the scope of this provision, by enacting "that no person shall be naturalized nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any *general election* within its territorial jurisdiction."

There can be no doubt that the object of this provision was to prevent the fraudulent procurement of naturalization certificates by withdrawing the opportunity and making it impossible for anyone legally to be admitted to citizenship at a time when the temptation to violate the law in an effort to become qualified to vote is so strong and persuasive. But the restraint here imposed evidently does not apply to all political elections, even though the temptation to secure admission to citizenship fraudulently on the part of some aliens in order to vote be, in a measure, equally present. To have made it apply to all elections of whatever kind wherein citizenship is a prerequisite qualification to vote might have seriously interfered with an efficient administration of the law by resulting in too frequent congestions of naturalization business in the courts, especially in the large cities. But it seems a fair inference that Congress meant that the provision should apply to other than congressional and presidential elections when it changed the wording of the bill from "congressional or presidential election" to "general election," the latter term, according to popular usage and understanding as well as its settled meaning in the law, implying an election general as to all the people of a State or of the United States.

Bouvier's Law Dictionary defines "general election" as "an election of officers of the General Government, either federal or state, as distinguished from an election of local officers." (See also Words and Phrases, vol. 4, pp. 3062, 3063.) Congress evidently used that term in this sense in the naturalization act of June 29, 1906, thus bringing within the provisions of the act elections for the choice of state officers alone, as well as elections for the choice of federal officers. There seems to be no reason to suppose

that the term, as used, was intended to have any different signification.

In order to come within the definition of the term as indicated, the election must be for the choice of officers of the General Government, either state or federal. Purely local elections, therefore, such as municipal elections, would not be included.

While the Pennsylvania elections referred to in your inquiry are municipal or local, it is pointed out that they are held throughout the State simultaneously, pursuant to state law, and the question arises whether their being thus held simultaneously constitutes a general election within the meaning of section 6 of the naturalization act of June 29, 1906.

The constitution of Pennsylvania provides in Article VIII, in respect to elections, as follows:

"SEC. 2. The general election shall be held annually on the Tuesday next following the first Monday of November, but the general assembly may by law fix a different day, two-thirds of all the members of each house consenting thereto.

"SEC. 3. All elections for city, ward, borough and township officers, for regular terms of service, shall be held on the third Tuesday of February."

In *Wilkes-Barre v. Luzerne County* (6 Pa. Superior Ct. Rep. 600), the court, speaking of the character of the elections provided for by the constitution as above quoted, said:

"The distinction is here clearly made between what is known, in common parlance, as the fall and spring elections, and it is to be presumed that in all laws relating to the subject the legislature, in legislating upon the general subject observes the distinction so clearly preserved in the constitution, unless the contrary clearly appears. This constitutional distinction is in ordinary, popular use, and our elections are known as general, municipal or local and special."

The municipal elections referred to are thus regarded in the State as not constituting a general election. The fact that they are held simultaneously in all the municipalities

150 *Registration of Post-Card Lithographs Made Abroad.*

of the State can not operate to change their character as local elections. They remain separate and distinct elections, affecting only certain individual corporate communities and not the people generally of the State, and it is my opinion that they do not constitute a general election within the meaning of section 6 of the act of Congress approved June 29, 1906 (34 Stat. 596).

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

COPYRIGHT LAW—REGISTRATION OF POST-CARD LITHO-
GRAPHS MADE IN GERMANY.

Lithographic reproductions of original paintings, in the form of illustrated post-cards, made in Germany, are subject to registration under the copyright law of March 4, 1909 (35 Stat. 1075), provided the original paintings may properly be classified as works of art.

DEPARTMENT OF JUSTICE,

January 27, 1910.

SIR: I have the honor to acknowledge receipt of your communication of the 11th instant, in which, for the guidance of the register of copyrights, you request my opinion as to whether or not certain lithographs of paintings made in Germany are subject to registration under the copyright law of 1909 (35 Stat. 1075).

The following appear to be the facts: Certain paintings were created in England by an artist who was a British subject, and these paintings have never been within the United States. On the presentation of photographs thereof, with applications for registration of copyright under Class "G," section 5, act of March 4, 1909 (35 Stat. 1077), as "works of art," the applications were passed for entry and certificates of registration were issued. Subsequently, Davidson Brothers, of New York, by permission of the owner of the copyrights of the originals, published by circulation and sale, reproductions of the original paintings in the form of illustrated post-cards, produced by lithographic process in Germany; and, fearing that the

copyrights of the originals might not protect the reproductions, immediately after publication the publishers sent to the register of copyrights two copies of each of the reproductions, accompanied by fees for entry, with proper application for entry under Class "H," to wit, "reproductions of a work of art;" and the question propounded is, whether under the manufacturing provisions of section 15 of the act of March 4, 1909 (35 Stat. 1078), these lithographic reproductions are entitled to registration.

The act of March 4, 1909, is entitled "An act to amend and consolidate the acts respecting copyright," and the entire subject with reference to what works may be copyrighted, and the manufacturing provisions relating to the type and plates from which they shall be printed, and what importations thereof are excluded, are fully covered by the provisions of this act; and consequently, all prior laws relating thereto are, by implication, repealed. (*Henderson's Tobacco*, 11 Wall. 652, 657; *Norris v. Crocker et al.*, 13 How. 429, 438; *Pana v. Bowler*, 107 U. S. 529, 538.)

Our inquiry, therefore, must be confined to the provisions of this act alone. Section 15 of the act reads as follows (35 Stat. 1078):

"That of the printed book or periodical specified in section five, subsections (a) and (b) of this act, except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this act, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photo-engraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photo-engraving process, and also to separate lithographs or photo-engravings, except where in either

case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art; but they shall not apply to works in raised characters for the use of the blind, or to books of foreign origin in a language or languages other than English, or to books published abroad in the English language seeking ad interim protection under this act."

From sections 12, 16, and 17, as well as from its own terms, it is clear that a compliance with the manufacturing provisions of this section is a condition precedent to a valid registration of the copyright. But the applicants for the copyrights in question insist that these provisions do not here apply, because, first, they are applicable to only lithographs and photo-engravings which are used as illustrations within books consisting of a printed text and such illustrations, and to lithographs and photo-engravings which are intended to be used in books after importation or to be bound in book form; and, second, because being reproductions of works of art, they are expressly excepted from the conditions relating to manufacture.

These two contentions will be considered in the order mentioned.

First. Whether or not the first contention shall be sustained depends upon the meaning of the phrase, "and also to separate lithographs or photo-engravings." It is insisted that this phrase includes only lithographs and photo-engravings which are to constitute, after importation, parts of books, or to be bound in book form; and the following provisions, which appear in this section and elsewhere in the act, are cited in support of this insistence: (1) In the first clause of the section reference is made only to works mentioned in subsections (a) and (b) of section 5 of the act, which are—

"(a) Books, including composite and cyclopædic works, directories, gazetteers, and other compilations;

"(b) Periodicals, including newspapers;"

(2) in section 12, in providing that after copyright has been secured by publication of the work with the notice of copyright two copies shall be deposited in the copyright office, it is specified that these copies, "if the work be a book or periodical, shall have been produced in accordance with the

manufacturing provisions specified in section fifteen of this act," and no reference is made to lithographs and photo-engravings; (3) in section 16, in specifying the character of affidavit which shall accompany the work in order to secure the enforcement of the manufacturing provisions of section 15, books alone are mentioned, and no reference is made to lithographs or photo-engravings; and (4) in section 31 the importation of books alone which have not been produced in accordance with the manufacturing provisions of section 15 is prohibited.

It is true that in the beginning of section 15 reference is made only to books and periodicals, and that it is there specifically provided where the type shall be set or the plates made from which the books and periodicals shall be printed, and where the books shall be bound, but it is clear that it was intended to make some extension of the application of these provisions beyond the classes embraced in the first part of the section. This is shown by the language that the specified "requirements *shall extend*," which, of course, means that they were to apply to something which had not theretofore been mentioned. And the first character of works affected by the extension are illustrations "within a book consisting of printed text and illustrations produced by lithographic process or photo-engraving process;" and this being deemed insufficient, the provisions were further extended to "*separate* lithographs or photo-engravings." The natural inference from this language is, that inasmuch as the lithographs and photo-engravings just previously mentioned are such as are connected with books, those to which reference is here made are separate from books; and that there being no limitation as to the character of these separate lithographs and photo-engravings, and no distinction as to what uses they shall be put, all lithographs and photo-engravings which are not, and are not intended to be, connected with books, are included in this second extension clause; and this construction must prevail unless the contrary is clearly shown by the other provisions in the act.

It may be admitted that there is an apparent inconsistency in the language of sections 12 and 16, and this construction of the clause of section 15 mentioned, but is

this inconsistency such as to require a strained and unnatural meaning to be given to this clause? As heretofore said, a compliance with these manufacturing provisions is a prerequisite to the validity of a copyright. Sections 15 and 16 deal alone with these provisions, while they are referred to in connection with books and periodicals in section 12; and to determine the extent of these requirements, all these sections must be read together. When this is done it does not follow that because a certain requirement is not found in one of the sections it does not exist at all, and must be stricken out when found in another. In many instances the contrary is the proper method of reaching the correct meaning of an act, as a whole, and such method is, I think, the proper one to adopt in construing this act. That is, if in either of these sections there appears a requirement that these manufacturing provisions apply to lithographs and photo-engravings, not connected with or intended to be connected with books, it should be given its full force and effect, regardless of whether it be found elsewhere or not. Such lithographs and photo-engravings are clearly not included in that clause of section 12 which relates to this subject, and which reads:

“Which copies, if the work be a *book* or *periodical*, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this act.”

Nor are they mentioned in section 16; but, as above shown, they are embraced in the unqualified language of section 15.

Their absence from section 16, in which the contents of the affidavit required to show a compliance with section 15 is minutely set out, is especially striking; but it certainly can not be held that section 16 is controlling, and that the manufacturing provisions apply only to works mentioned therein, because it is expressly restricted to *books*. Not even are periodicals mentioned, and nothing is there said about lithographs and photo-engravings which are used as illustrations of books.

This limitation in section 16 was manifestly made by design, and not by oversight, as shown by its introductory

language, to wit: "*That in the case of the book the copies so deposited shall be accompanied by an affidavit,*" thus indicating that books were here separated from other things which had been associated with them in the preceding section. The reason for making this distinction does not appear, but the failure to express the reason does not justify the conclusion that it did not exist, and certainly does not require that section 15 should be vitally altered so as to correspond with this section.

In section 31 a subject is dealt with which is materially different from that treated in the above-mentioned sections. Here it is specified what copyrighted books may be admitted to importation; and a violation of this section does not invalidate the copyright. Consequently, its relationship to said sections is not so intimate as that between themselves, and the existence of any discrepancy between its and their language is not entitled to as much consideration. But, likewise in this section, only books are mentioned, and no reference is made even to periodicals.

I think it quite probable that in the act as originally drafted some of the apparent inconsistencies between the several sections mentioned did not exist, but that during the extended hearings held by the committee who had the bill in charge, amendments were determined upon, which were inserted in section 15 alone, and by inadvertence, sections 12 and 31 were not amended to correspond. This is indicated by the comments upon section 15 in the explanation of its various features, prepared by the committee before the bill was reported, which comments are as follows:

"It was felt by your committee that if there was reason, as we think there was, for the requirement that the book should be printed from type set in this country, there was just as much reason for a requirement that the book should be printed and bound in this country, and that the ordinary illustrations produced by lithographic process and photo-engraving process, and separate lithographs or photo-engravings, should be made in this country. That protection to the men engaged in the work of setting type, making plates, printing and binding books is given by this section, which also carries the penalty provision for knowingly

making a false affidavit as to compliance with these provisions."

But, however the discrepancies may have arisen, I do not think they are such as to justify a modification of the plain and unequivocal meaning of the clause in section 15, which relates to "separate" lithographs and photo-engravings, and, therefore, find against the applicants' first contention.

Second. The second question is whether or not the cards in question fall within the exception—

"Where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art."

It is insisted on the part of the applicants that the phrase "or reproduce a work of art" should be treated as separate and distinct from the preceding phrases, and that the exception should read as if written "except where in either case the subjects represented are located in a foreign country and illustrate a scientific work, and except where they reproduce a work of art."

In my judgment, such a construction of the exception is not warranted, and this is clearly shown by the comments of the committee having the bill in charge and by the history of the bill in Congress. The bill, as originally reported, omitted the phrase "and illustrate a scientific work or reproduce a work of art," which left the exception reading "except where in either case the subjects represented are located in a foreign country." (Cong. Rec., vol. 43, p. 3702.) Upon this subject the committee in its comments said:

"An exception, so far as lithographs and photo-engravings are concerned, is made in case 'the subjects represented are located in a foreign country.'

"It was contended with much force in the hearings before the committee that the color scheme in lithographs to illustrate a scientific work, particularly a work on surgery, must be worked out under the eye of the author. It was further said that a lithograph reproducing a painting must be worked out in front of the painting, and that possibly the same theory would apply to a lithograph of

scenery or any lithograph intended to accurately represent the color scheme of any object. The committee finally decided to leave this matter as it is now found in the bill, *although it was contended that the exception might well be confined to lithographs illustrating a scientific work or reproducing a work of art.*"

And in accordance with the last suggestion, the committee subsequently added the phrases making the limitation mentioned, as an amendment to the bill. (Cong. Rec., vol. 43, p. 3704.)

There can, therefore, be no doubt that the meaning of this exception is, that the subject represented in the lithograph or photo-engraving must be located in a foreign country, whether that subject be something the representation of which is used to illustrate a scientific work or a work of art.

It is true that the clause when thus interpreted is not strictly grammatical, but, in fact, by any interpretation, the words "lithographs or photo-engravings" must be understood as subjects of "illustrate" and "reproduce;" as it is quite clear that it is not "the subjects" that "illustrate a scientific work or reproduce a work of art," but the lithographs or photo-engravings of such subjects.

Therefore, the exception is not so broad as is contended for by the applicants, but as here construed, since the paintings are located in a foreign country, these cards fall within the exception, provided the paintings are "works of art;" and since they have been copyrighted as such, and possess artistic beauty, I know of no reason why they should not be so considered.

It has been suggested that if it be held that lithographs and photo-engravings of all works of art located in a foreign country may be made abroad, the purpose of the law to protect American workmen might be evaded by carrying works of art from this country into a foreign country and there having them lithographed, and also by having paintings made in a foreign country for the purpose of lithographing. Whether or not Congress had such grounds of objection in mind when this act was passed, does not appear from its language; and I am not now called upon to determine whether

a painting carried from this country into a foreign country for the purpose of evading the spirit of the law and in fraud of the law would be considered as located in a foreign country in the sense of the statute; but there is certainly nothing in the act to indicate that Congress intended to make any distinction between works of art based upon the purposes for which they are created. If Congress had not intended to embrace in the exception paintings created in a foreign country for the purpose of lithographing or photo-engraving, it could easily have expressed such intent; and since it failed to do so by the use of any language from which such a restriction may be implied, it is not within the province of a judicial officer called upon to interpret this statute to read into the act a provision of such a vital character.

On both questions presented, I think the plain, common-sense meaning of the terms of the statute should be followed, a modification thereof not being warranted by any other provisions in the act or by extrinsic facts.

Therefore, since the original paintings have already been classified by the Register of Copyrights as works of art, and have been registered as such, I am of the opinion that the cards in question should be admitted to registration for copyright as reproductions of works of art.

Respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

SAULT STE. MARIE BRIDGE COMPANY—ACQUISITION OF PROPERTY.

The acquisition of the bridge occupied by the Sault Ste. Marie Bridge Company, north of the present Saint Marys Falls Ship Canal, may be excepted from the operation of section 11 of the act of March 3, 1909 (35 Stat. 820), which directs the acquisition by condemnation of all property lying between said ship canal and the international boundary line at Sault Ste. Marie, in Michigan, as the bridge is not needed for any government purpose and it is not an obstruction to navigation.

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It is always presumed that the legislature intended exceptions to its language which would avoid such results.

DEPARTMENT OF JUSTICE,

January 29, 1910.

SIR: I am in receipt of your letter of the 28th instant, in which you ask an expression of opinion from this department respecting the acquisition of property occupied by the Sault Ste. Marie Bridge Company, a Michigan corporation.

It appears from your letter that the act of March 3, 1909 (35 Stat. 815, 820), being the general rivers and harbors bill of that year, contained the following provision (section 11):

"That the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present Saint Marys Falls Ship Canal throughout its entire length and lying between said ship canal and the international boundary line at Sault Ste. Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith.

"The Secretary of War is hereby directed to take proceedings immediately for the acquisition by condemnation or otherwise of all of said lands and property of every kind and description, in fee simple absolute."

An act approved July 8, 1882 (22 Stat. 154), authorized the Sault Ste. Marie Bridge Company, a Michigan corporation, in conjunction with any person or corporation authorized by the Dominion of Canada with the sanction of the British Government, to build a bridge across the Sainte Marie River, the plans and location of the structure to be approved by the Secretary of War. The bridge was constructed in accordance with such approved plans, and has since been maintained and used without interruption for railway purposes. The construction of this bridge was also authorized by the Dominion of Canada by act assented to May 17, 1882, and the bridge is used as an international railway bridge at that point.

Your letter contains the following statement:

"Such portion of the Sault Ste. Marie Bridge, with the land on which it rests, as is included between the American shore of the river and the international boundary, as

falls within the limits described in the clause of legislation above cited, seems to be included among the properties of 'every kind and description' which the law makes it necessary to acquire; for that reason it has been included in the notice given preliminary to the condemnation proceedings which the Secretary of War is required to institute in a subsequent clause of the legislation hereinbefore cited.

* * * * *

"As a matter of fact the bridge, which is used for railroad purposes, is not needed for any government use, and is not at present an obstruction to navigation. It is proper to say, also, that the structure is not necessary for any of the purposes set forth in section 11 of the act above cited. If its ownership were acquired the United States would be compelled, if it maintained it, to make extensive alterations at very considerable expenses which, under the terms of the act authorizing the construction of the bridge, the bridge company can be compelled to execute at its own cost."

And you desire an expression of my opinion as to whether you are compelled by the act of Congress above referred to to acquire the land upon which the bridge stands, even though, as a matter of fact, the property is not needed for government use; the bridge does not constitute an obstruction to navigation; and if the ownership were acquired it would impose upon the United States a very considerable expense in making alterations which otherwise the bridge company can be compelled to execute at its own cost; and that, in your opinion, if the acquisition of the bridge should be necessary to the execution of the statute, an application should be made to Congress to relieve the Government of that necessity.

It is true that the language of section 11 is very broad in its character. It declares that the ownership in fee simple of "all lands and property of every kind and description" north of the present canal and lying between it and the international boundary line at Sault Ste. Marie is necessary for the purposes of navigation, etc. It appears from statements made to me by the engineer officer in charge of the

work, as well as by the counsel of the bridge company, that the bridge company is about to convey to the United States the only land which it directly owns falling within the description in section 11, and that its only remaining interest in land within the area described in the statute consists in its license or easement to maintain its piers in the bed of the stream.

A portion of section 11 of the act specifically revokes certain permits, licenses, and authorities heretofore granted by the United States to certain designated power companies and electric companies, but no other licenses or easements are specifically dealt with by the act. The rule of construction is well settled that:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." (*United States v. Kirby*, 7 Wall. 482-486.)

It must be presumed that Congress legislated with a knowledge of the notorious facts existing at the Sault Ste. Marie. The purpose of the act was to improve the navigation of the waters of the St. Marys Falls Ship Canal and those connected therewith, and it was the land necessary for that purpose which Congress authorized to be taken. It is hardly to be assumed that Congress intended an international railroad bridge of the character of the structure in question to be acquired by the United States simply because its piers rest on land under water within the limits of the line of improvement when, as a matter of fact, as stated in your letter, the bridge is not needed for any government use and is not an obstruction to navigation, and when the acquisition of the bridge would devolve upon the Government a large expense which would otherwise be borne by the bridge company. Such an absurd result as this, in my opinion, is not acquired by any reasonable construction of the act, and I therefore am of the opin-

ion that the acquisition of the bridge proper can be excepted from the operation of the statute, leaving the other lands within the limits described therein to be acquired by condemnation.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

COPYRIGHT—RENEWALS AND EXTENSIONS.

The renewal or extension of copyrights under section 24 of the act of March 4, 1909 (35 Stat. 1080), can be secured only by the person or persons specifically designated in the statute, and can not, therefore, be granted to the assignee of the copyright.

The privileges of copyright are purely statutory, and the right to a renewal or extension of a copyright must be found within the statute.

DEPARTMENT OF JUSTICE,

February 3, 1910.

SIR: I have the honor to acknowledge receipt of your communication of December 10, 1909, with certain documents from the register of copyrights inclosed, from which it appears that a number of applications have been made for renewal or extension of copyrights under section 24 of the act of March 4, 1909 (35 Stat. 1080), said applications being divided into two general classes, to wit:

(1) Applications made by assignees under direct assignments of the renewal or extension term from the persons named in the statute as entitled to renewals or extensions.

(2) Applications made by assignees who purchased the copyrighted work, either when the original copyrights were secured or subsequent thereto, and who also took assignments of the copyrights.

And you ask my opinion whether such renewals or extensions can be granted at the instance of the assignees.

The privileges of copyright are purely statutory, and when one seeks a renewal or extension of a copyright his right thereto must be found within the statute. The provisions of the act of March 4, 1909 (35 Stat. 1075), which bear upon this question, are the following:

"SEC. 8. That the author or proprietor of any work made the subject of copyright by this act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this act:

"SEC. 23. That the copyright secured by this act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author), or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

"SEC. 24. That the copyright subsisting in any work at the time when this act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this act, including the renewal period: *Provided, however,* That if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: *Provided,* That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term."

It will be observed that section 8 declares who may procure original copyrights; that section 23 provides who may procure renewals of copyrights *secured by this act*, and that section 24 prescribes who may procure a renewal or extension of a copyright "subsisting in any work at the time when this act goes into effect * * * for a further period such that the entire term shall be equal to that secured by this act, including the renewal period."

Each of these sections is specific in its terms, and leaves but little or no room for construction. In the first it is expressly provided that the assigns of an author or proprietor shall have a copyright for the work upon complying with the conditions specified in the act. In the second it is provided that if the work be posthumous or composite upon which the original copyright was secured by the proprietor, or if copyrighted by a corporate body otherwise than as assignee or licensee of the individual, or by an employer for whom such work is made for hire, the proprietor may procure the renewal, but that in all other cases it must be procured by the author, if living, or if dead, by the widow, widower, or children, or if they also be dead, by the author's executors, if there be a will, or otherwise by his next of

kin; and the third section mentioned, the one here applicable, requires the extension or renewal to be procured by the author, if living, or if dead, by the persons and in the order mentioned in the preceding section, except as to composite works which were originally copyrighted by the proprietor, in which case the proprietor may secure the extension.

The very fact that each of these sections enumerates with such particularity the persons who may exercise the privilege of securing copyrights and having them renewed and the order in which the right vests, and that in these particulars the sections materially differ from each other, shows that the persons enumerated are exclusive of all others and that it was not the purpose of Congress to confer the right upon any person or persons not therein specifically mentioned.

This view is well sustained by the authorities. The act of February 3, 1831 (4 Stat. 436) gave the right of renewal to the author, if living, or if dead, to his widow, child, or children. In commenting upon this provision of the act and a provision of a previous act, the court, in *Pierpont v. Fowle*, 19 Fed. Cases, 652, 659, said:

"Both refer to authors alone, and not their assigns, as entitled. They do not even embrace in terms, express assignees of a second term, made before the second term begins, and the last act does not name assigns at all. So the extension allowed under the act of 1831, of a copyright taken out under that act, looks entirely to the author and his family, and not to assignees."

By the act of July 8, 1870, section 88 (16 Stat. 212; Rev. Stats., sec. 4954), the right of renewal was given to the author, or his widow or children, if he be dead; and with reference to the right of renewal under this statute, in *Drone on Copyrights*, page 261, it is said:

"Besides granting copyright to the author or owner of a work, and the assignee of such person, for twenty-eight years, the existing statute of the United States provides that, at the end of that term, the author, inventor, or designer, if living, or his widow or children if he be dead, may secure a renewal of the copyright for fourteen years. As neither the owner of a work nor an assignee is mentioned

in this section, it would seem that the copyright for this additional term will not vest *ab initio* in such person. But elsewhere the ground is taken, that when the renewed copyright has been secured by the author, or his widow or children, it may be transferred to an assignee."

And again, on page 333:

"Section 4954 of the Revised Statutes, which provides for a renewed term of copyright, makes no mention of an assignee. The view has been elsewhere expressed that the copyright for this term will not vest *ab initio* in an assignee, but only in the author, his widow, or children. Hence, when an author has assigned his entire interest in a work, and has thereby or otherwise barred himself and his family from securing the copyright for the second term, the assignee is powerless to make the renewal for his own benefit."

However, I do not wish to be understood as approving the assumption here expressed that the author, or in case of his death, the other persons mentioned in the statute as being entitled to the right of renewal may bar themselves of that right. Such right is created by the most explicit v terms of the statute, and no recognition is there given of a previous assignment of the copyright, or a conveyance of the author's right in the copyrighted work, or of any kind of contract that he may have made with reference thereto. When the application for renewal is presented to the register of copyrights, the only thing left for his consideration is whether the applicant is one of the persons designated in the statute. But who may possess the legal or equitable right in the copyright after renewal is another question, and one which is to be determined by the terms of such contract as the author or other person or persons entitled to the renewal may have entered into before or after the renewal is had.

Much reliance is placed by the applicants on the case of *Paige v. Banks*, 7 Blatch. 152, and 13 Wall. 608, 614. The facts in that case were, that Paige, the testator of the plaintiffs, had on October 7, 1828, entered into a contract with Gould and Banks, whereby he was to furnish them in manuscript the reports of his court for publication, and that they were to "have the copyright of said reports, to them and their assigns forever." Under the act of 1790 the term of

copyright was fourteen years, with right of renewal for fourteen years additional, the assigns of an author having the right to procure both the original copyright and the renewal; and on January 5, 1830, registration for the original copyright was made in the names of Gould and Banks. On February 3, 1831, an act was passed which extended all copyrights then existing to a term of twenty-eight years, with right of renewal for fourteen years longer, but the renewal privilege was restricted to the author, or, if he be dead, to his widow, or child or children. When the original term expired on January 5, 1858, both Gould and Banks and Paige went through the usual forms to procure a renewal of the copyright. Paige subsequently died, and thereafter his executor filed a bill against Gould and Banks to enjoin them from further printing and vending the work, and for an account of the profits after January, 1858. The bill was dismissed by both the court below and the Supreme Court.

The decision turned entirely upon the construction of the contract between Paige and Gould and Banks, the sole question considered being whether, under the contract, Paige had parted with the entire interest in the work, this question being thus stated by the Supreme Court:

"Independent of any statutory provision the right of an author in and to his unpublished manuscripts is full and complete. It is his property, and like other property is subject to his disposal. He may assign a qualified interest in it, or make an absolute conveyance of the whole interest. The question to be solved is, Do the terms of this agreement show the intent to part with the whole interest in the publication of this book, or with a partial and limited interest?"

And, after an analysis of the contract, the court held that—

"As between the parties to the agreement the absolute interest was conveyed by the stipulation of Paige, that he would furnish the manuscript for publication."

In considering the clause in the contract "and the said Gould and Banks shall have the copyright of said reports to them, their heirs, and assigns forever," the court said:

"It is not covenanted that the publishers should take out the copyright, nor is there any express agreement for

an assignment to them by Paige, if he should take it out. Undoubtedly the provision, that the publishers 'should have the copyright,' would authorize them to apply for it, and if Paige had taken it out in his own name it would have inured to their benefit. But, as between Paige and the publishers, the rights of the latter could not be estimated differently, whether they had or had not availed themselves of the provisions of the act."

The act of 1790 expressly provided that the assignees of an author of a work could procure a copyright thereof, and hence the statement of the court that the stipulation in the contract with reference to the copyright authorized Gould and Banks to apply for it. Therefore, the point of the decision was, that Paige having transferred his entire interest in the work to Gould and Banks, and they having thereby acquired a perpetual right to publish and sell the same, *independent of the question of copyright*, they could not be enjoined from its publication and be made to account for the copies sold after the expiration of the original term. The question here presented was not considered in that case, and the case is given attention only because it is cited by applicants as conclusive authority in their favor.

The comments of the committee upon sections 23 and 24, which accompanied the bill when reported, show conclusively that it was not intended that the assigns of a work should have the right of renewal, except as specifically provided for therein. Among other things, the committee said:

"It was urged before the committee that it would be better to have a single term without any right of renewal, and a term of life and fifty years was suggested. Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and *the law should be*

framed as is the existing law, so that he could not be deprived of that right.

* * * * *

"Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or, in the absence of a will, his next of kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal.

"In the case of composite or cyclopedic works, to which a great many authors contribute for hire, and upon which the copyright was originally secured by the proprietor of the work, it was felt that the proprietor of such work should have the exclusive right to apply for the renewal term. In some cases the contributors to such a work might number hundreds and be scattered over the world, and it would be impossible for the proprietor of the work to secure their cooperation in applying for the renewal."

It readily appears how the right of renewal may be a valuable asset to an author, though he may have previously parted with all interest in the copyrighted work. When renewed, like all other copyrights, it is assignable. (Sec. 42 of act; Drone on Copyrights, 333.) And no doubt it may be the subject of a valid contract before renewal, which would carry the equitable, if not the legal, title thereto when renewed. And, therefore, the owner of the work who, after the expiration of the original term, would be without protection, would, if the work be a valuable one, gladly pay a reasonable price for the extension. At any rate, the right of extension was clearly given for the benefit of the author, and the provision should not be construed against him, unless the language of the statute clearly requires such construction, which it does not.

It is not intended in this opinion to determine any question of law which relates to the relative rights of authors

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and their assigns, and such rights are mentioned only by way of illustration or argument. The matter here for determination is one solely for the guidance of the Register of Copyrights in granting renewals of copyrights; and, for the reasons above stated, I hold that he should be governed by the language of the statute, and grant a renewal to no one other than the person or persons mentioned therein. The applicants here in question are the owners of the works by purchase, and assignees of the original copyrights, and in some cases, have taken assignments of the renewal terms. But in neither case does the statute authorize the extension to be made in the name of the assignee, and the applications should, therefore, be disallowed.

Respectfully,

J. A. FOWLER,
Assistant Attorney-General.

Approved:

GEORGE W. WICKERSHAM.

The PRESIDENT.

COURT-MARTIAL—DISCHARGE OBTAINED THROUGH
FRAUD.

The Secretary of the Navy has authority to revoke the discharge of an apprentice seaman, procured by fraud while a general court-martial prisoner, and may resume jurisdiction over the man. In this case the prisoner made a bogus confession, claiming that he had committed a murder for which he was wanted by the civil authorities, and after his discharge repudiated his confession.

DEPARTMENT OF JUSTICE,
February 8, 1910.

SIR: I have the honor to acknowledge the receipt of your letter of the 2d instant calling attention to the circumstances leading to the separation from the navy of one James Hall, an apprentice seaman, and requesting my opinion as to what action, if any, can now be taken by the Navy Department with a view to punishing Hall for his fraudulent conduct in connection therewith.

The facts of the case are stated in your letter as follows:

“Briefly, James Hall, while a general court-martial prisoner on the U. S. S. *Southery*, made a confession to

the effect that he had murdered a girl in the city of Rochester, N. Y., on August 7, 1909. The matter was communicated to the civil authorities of Monroe County, N. Y., and Hall was interviewed by the district attorney of that county on board the *Southery*, to whom he made a further confession in the case. The commanding officer of the *Southery* then telegraphed to the department requesting authority to deliver Hall into the custody of the sheriff for Monroe County. In response, the department telegraphed the necessary authority, at the same time directing that the dishonorable discharge imposed as part of the court-martial sentence against Hall 'be given immediately,' which was accordingly done. It now appears that after Hall arrived at Rochester 'he repudiated his confession in its entirety, and an investigation showed that he had been lying, evidently for the sole purpose of escaping imprisonment on board the prison ship at Portsmouth.'

Continuing, you say:

"Under these circumstances, the question arises whether Hall having obtained his discharge from the navy through fraud, and the discharge having been issued for the sole purpose of having him tried and punished for the murder which he had confessed, such discharge may now be canceled and Hall tried by general court-martial as an enlisted man of the navy for the military offenses involved in his false and fraudulent statements and the consequences thereof; or, if this can not be done, whether his conduct constitutes a fraud against the United States for which he can be tried under article 14 of the Articles for the Government of the Navy."

I am informally advised to-day that Hall is about to be released by the state authorities.

The facts stated clearly show that Hall effected his discharge from the navy by deliberate fraud. "Where a party intentionally or by design misrepresents a material fact or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in every such case there is a positive fraud in the truest sense of the terms." (Story Eq. Juris., 1886, vol. 1, 205.)

The question then is, Can the discharge granted as the result of the fraudulent representations made by Hall be revoked, and the latter reinstated to his former status in the navy and held answerable for his misconduct in appropriate court-martial proceedings? Upon principle and authority, this question should, I think, be answered in the affirmative.

It appears that Hall was released from his imprisonment in the navy and given a dishonorable discharge, not as a matter of right or of grace to him, but wholly in consideration of his being brought to trial and punished for a felonious crime which imperatively called for the speediest enforcement of the demands of justice. When, therefore, it is found that such discharge was procured by willful and deliberate fraud, it would be contrary to the most elementary principles of the law to permit him to defeat the ends of justice and obtain his liberty as the result of such deceit.

In the case of *Prior II. Coleman*, a soldier in the service of the United States, Attorney-General Devens, in considering the effect of an honorable discharge obtained by fraud, said (16 Op. 349, 352):

"I will consider briefly the effect of these discharges; and, first, the 'honorable discharge,' a certificate of which the prisoner received in 1870, must be treated as a nullity. It was obtained by the grossest falsehood and perjury. In his affidavit he deposed that at the time of the discharge of his regiment he was in confinement for no fault or misconduct on his part. In *fact*, he was then a prisoner convicted of an infamous crime and under sentence of death."

In *Commonwealth v. Halloway* (44 Pa. St. 210, 219) it was held that a pardon obtained by fraud was void.

Having decided that you have authority to revoke the discharge issued in this instance and may resume jurisdiction over Hall, it is unnecessary to consider the second part of your inquiry.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

FUR-SEAL SKINS ON VESSEL SEIZED—IMPORTATION.

Fur-seal skins taken in waters outside of the 3-mile limit, but within the area described by section 1 of the act of December 29, 1897 (30 Stat. 226), and afterwards seized on schooners engaged in unlawful seal fishing within the 3-mile limit, are forfeitable to the United States and need not be destroyed as directed by section 9 of that act, as this does not constitute an importation within the meaning of that section.

The word "importation," as used in the customs laws, is the bringing of goods into the ports of the United States for the purpose of introducing them into the commerce of the country.

DEPARTMENT OF JUSTICE,
February 8, 1910.

SIR: Your communication of February 3, 1910, was duly received. Therein you state the following facts:

On July 22, 1908 the revenue cutter *Bear* seized the Japanese schooners *Kinsei Maru* and *Saikai Maru* off St. Paul Island, Alaska, for killing seals within the 3-mile limit. The schooners and their paraphernalia and cargoes were placed in the custody of the United States marshal at Unalaska, and the same were there condemned and sold by proper proceedings. Both vessels contained fur-seal skins taken outside the 3-mile limit but in the area described in section 1 of the act of December 29, 1897 (30 Stat. 226), to wit: "In the waters of the Pacific Ocean north of the thirty-fifth degree of north latitude and including Bering Sea and the Sea of Okhotsk."

And you ask my opinion whether the introduction of these skins into the United States in this way constituted an importation, and whether they should therefore be destroyed as provided in section 9 of the act of December 29, 1897.

By the act of July 1, 1870 (16 Stat. 180), which constitutes sections 1960 to 1972 of the Revised Statutes, the killing of fur seals was prohibited—

"Upon the islands of Saint Paul and Saint George, or in the waters adjacent thereto, except during the months of June, July, September, and October, in each year,"
and also at all times by specified methods, with certain exceptions as to natives; and a limitation was placed upon the number of seals that might be killed upon said islands.

The act also provided for the execution of a lease—after the expiration of one then existing—of the right to engage in taking fur seals on said islands, for the term of twenty years, and upon the expiration of the same, for a renewal thereof, or the execution of a new lease to other parties.

And by section 1967, Revised Statutes, it was provided that—

“Every person who kills any fur seal on either of those islands, or in the waters adjacent thereto, without authority of the lessees thereof, * * * shall for each offense be punished as prescribed in section nineteen hundred and sixty-one; and all vessels, their tackle, apparel, appurtenances, and cargo, whose crews are found engaged in any violation of the provisions of sections nineteen hundred and sixty-five to nineteen hundred and sixty-eight, inclusive, shall be forfeited to the United States.”

By section 3 of the act of December 29, 1897 (30 Stat. 226), it was provided that every person who should be guilty of a violation of the provisions of the act with reference to killing, capturing, or hunting, at any time or in any manner, fur seals in that portion of the Pacific Ocean above described, should suffer the penalty therein prescribed; and that—

“Every vessel, its tackle, apparel, furniture, and cargo, at any time used or employed in violation of this act, or of the regulations made thereunder, shall be forfeited to the United States.”

By section 9 of said act, it was provided:

“That the importation into the United States by any person whatsoever of fur-seal skins taken in the waters mentioned in this act, whether raw, dressed, dyed, or manufactured, is hereby prohibited, and all such articles imported after this act shall take effect shall not be permitted to be exported, but shall be seized and destroyed by the proper officers of the United States.”

From the statement of facts it appears that the seal-skins in question were taken outside of the 3-mile limit, in violation of sections 1 and 2 of the act of December 29, 1897, but that they were brought by the schooners engaged in the unlawful seal fishing within the 3-mile limit,

and the schooners and their paraphernalia and cargoes were seized under the provisions of the act of July 1, 1870, and were forfeited to the United States thereunder.

While the language of section 9 of the act of 1897 is very broad, yet it is necessary, in order to reach its true import, that it be read in connection with section 3 thereof, and also in connection with the previous legislation upon the same subject. Under the express provisions of section 3 of the act of 1897 and section 1967, Revised Statutes, the seizure and forfeiture to the United States of these skins as a part of the cargo of one of said vessels were authorized and directed, and the United States was thereby vested with the title thereto. This title was by the court proceedings by which such forfeiture was enforced, passed to the purchaser at the sale thereunder, and unless there be a positive statutory provision to the contrary, the title thus passed should be a valid one and should entitle the purchaser to the use of the property either in this or in a foreign country. I do not find in section 9 of the act of 1897 such positive provision. I do not think that section was intended to apply to skins which were thus acquired. The skins in question were taken outside the limits of the United States, and were brought therein by these schooners, not for the purpose of becoming a part of the merchandise of this country, or for the purpose of being there disposed of in any way, but as a mere incident to the cruise, which was carried on for the sole purpose of unlawfully hunting and killing seals; and such a bringing of an article into the limits of the United States can not be regarded as an importation within the meaning of this statute.

The meaning that is usually given by the courts to the word "importation" as used in the customs laws, is the bringing of goods into ports of the United States for the purpose of introducing them into the commerce of the country; and I think the same meaning should be given to the word as used in this section. Manifestly, it was not the intention of Congress to require the destruction of seal-skins when seized upon vessels engaged in poaching in violation of this statute. The object of the act was to discourage poaching by prohibiting the introduction of

skins thus obtained into the commerce of the country in such a way as to give profit to those who might take them in violation of the law. By their seizure and forfeiture to the Government those who took them unlawfully were deprived of all profit therein, and the ends of the statute were thereby fully met.

I am of the opinion, therefore, that the sealskins in question do not fall within the prohibition of section 9 of the act of December 29, 1897, and that it is not necessary that the same be destroyed under the provisions thereof.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

COPYRIGHT—FRAGMENT OF BOOK DEPOSITED.

Application for registration of copyright should be denied, (1) Where the *ad interim* deposit under section 21 of the copyright act of March 4, 1909 (35 Stat. 1080), is a complete book, and the permanent deposit under section 22 is only a part of such book; (2) Where both the *ad interim* and permanent deposits are fragments of the work; (3) Where the copy, printed and bound in accordance with the manufacturing provisions of section 15 of the act and deposited in the first instance, is only a fragment of the work; and (4) Where a complete book is deposited, but the affidavit correctly indicates that only a part of the work is printed in the United States.

The word "book," as used in sections 21 and 22, and in class (a) of section 5, and elsewhere in that act, means the entire book and not a fragment thereof.

DEPARTMENT OF JUSTICE,

February 9, 1910.

SIR: Your communication of January 18, 1910, where-with you transmit certain documents from the Librarian of Congress, was duly received. From the statement of the Librarian, it appears that in a number of instances, in attempting to comply with the provisions of the copyright law of March 4, 1909 (35 Stat. 1080), only parts of books have been deposited by applicants with the Register of Copyrights and copyrights applied for thereon; and I am asked what action should be taken by the register of

copyrights when an application is made which presents either of the following conditions:

1. Where the *ad interim* deposit under section 21 is a complete book, and the permanent deposit under section 22 is only a part of such book.

2. Where both the *ad interim* and permanent deposits are fragments of the work.

3. Where the copy, printed and bound in accordance with the manufacturing provisions of section 15 of the act and deposited in the first instance, is only a fragment of the work.

4. Where a complete book is deposited, but the affidavit correctly indicates that only a part of the work is printed in the United States.

In reply to these questions I have the honor to say:

The first two questions involve a construction of sections 21 and 22 of the copyright act, which relate to procuring a copyright in a book published abroad in the English language, while the last two involve the general provisions of the act.

Sections 21 and 22 read as follows:

"SEC. 21. That in the case of a book published abroad in the English language before publication in this country, the deposit in the copyright office, not later than thirty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book, shall secure to the author or proprietor an *ad interim* copyright, which shall have all the force and effect given to copyright by this act, and shall endure until the expiration of thirty days after such deposit in the copyright office.

"SEC. 22. That whenever within the period of such *ad interim* protection an authorized edition of such book shall be published within the United States, in accordance with the manufacturing provisions specified in section 15 of this act, and whenever the provisions of this act as to deposit of copies, registration, filing of affidavit, and

the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book for the full term elsewhere provided in this act."

Does the word "book," as here used, mean the entire book or a fragment of a book? It appears to me that there can be but one answer to this question. The requirement in section 21 that a deposit in the copyright office within the time specified "of one *complete* copy of the foreign edition" clearly indicates that in the enactment of these sections the entire book was in the mind of Congress, and not a fragment thereof.

I am also of the opinion that the same meaning should be given the word "book" as it appears in class (a), section 5, and elsewhere in the act. When it was enacted in section 8 "that the author or proprietor of any *work* made the subject of copyright by this act * * * shall have copyright for such *work* under the conditions and for the term specified in this act" it certainly was not intended that a chapter or two—a mere fragment of a book—should fall within the meaning of the word "work." Such fragment is not a "work," and can not be so considered. It is only a *part* of a work. There is a special reason why this meaning should be given the words "book" and "work" in this act which did not exist before the passage of the act of March 3, 1891. The copyright acts before the one of that date contained no provisions with reference to where and on what type or plates the book should be printed. But by section 15 of the present act it is provided in substance that all the work in connection with the printing and binding of every book accorded protection by the act shall be done within the limits of the United States, and by section 31 the importation of copyrighted books not manufactured in accordance with the provisions of section 15 is prohibited. Each part of the act should be so construed as to give effect to the legislative intent in the enactment of every other part. And to hold that a mere fragment of a book could be copyrighted, would open the door to the most extensive evasions of the manufacturing provisions of the act.

For illustration, the Librarian of Congress transmits through you what appears to be a booklet in pamphlet form of 51 pages, on the last of which appear the words "The end." This has been filed with the register of copyrights under section 21 for *ad interim* protection. But as a matter of fact this pamphlet contains only the first four chapters of the book, and how many more there are and of how many volumes the entire work consists there is nothing to indicate; nor could the extent of the work make any difference so far as the principle involved is concerned; nor can the principle be affected by the fact that the pamphlet purports to be a complete work. If protection be accorded these four chapters, no other publisher could afford to publish the remainder of the book, and though not *legally* protected by copyright, yet the protection of the remaining portion would in fact be perfect. But at the same time, neither the manufacturing provisions in section 15 nor the prohibitions against importations in section 31 would apply to the parts not copyrighted, and the publisher could have the entire remainder of the book printed abroad and imported and here bound with the four chapters printed within the United States. If the law should be construed to permit this, it is quite probable that the copyrighting of but a part of books which are not supposed to be of very substantial merit would become the custom. But independent of this consideration, there appears to be nothing in the statute which implies that but a part of a work may be copyrighted, nor have I been able to find any authorities showing that other similar statutes have been so construed.

For these reasons, I am of the opinion that an application should be refused when the deposit is made as shown in either of the first three inquiries. And the same rule should be applied to the fourth, because it is a necessary prerequisite to the registration of the copyright that the book should be printed as required by section 15, and if nothing but the entire work can be copyrighted, then all parts of it must be printed in accordance with the provisions of that section.

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

APPOINTMENT OF MIDSHIPMAN AT NAVAL ACADEMY—
REVOCATION.

A nominee for the office of midshipman in the Navy, whose qualifications have been regularly certified to by a Representative in Congress, who has passed the necessary mental and physical examination and received and accepted the appointment, can not, in the absence of fraud, be deprived of that office, although it should afterwards appear that he was not an actual resident of the congressional district whence he was appointed.

The eligibility of the nominee having been determined by a former Secretary of the Navy, that action, in absence of fraud, must be regarded as final and not subject to reexamination under a subsequent administration.

A vacancy occurring by reason of the removal of the midshipman could be filled, under the statute (34 Stat. 578), only by the selective appointment of the Secretary of the Navy.

A statute which empowers an officer or tribunal to appoint a person having certain qualifications, confers upon that officer or tribunal the power to determine the qualifications and eligibility of the appointee.

DEPARTMENT OF JUSTICE,
February 14, 1910.

SIR: I have the honor to comply with the request contained in your note of January 24, 1910, for an opinion as to the official and legal status of Donald Wills Douglas, a midshipman at the Naval Academy at Annapolis. The material facts are as follows:

On March 1, 1909, the Hon. Samuel McMillan, the Representative in Congress from the Twenty-first Congressional District of the State of New York, formally nominated Mr. Douglas to the Secretary of the Navy as second alternate for the office of midshipman, under the act of Congress making provision for such nomination. He had nominated a person as chief candidate, but had made none as first alternate. The nomination was upon one of the regular formal blanks furnished by the Navy Department for that purpose, and which require the Member making such nomination to certify, among other things, that the nominee was an actual resident of his district. In making that nomination the Representative said:

“He is an actual resident of the town of Cold Spring, on the Hudson, county of Putnam, in the Twenty-first Congressional District of the State of New York, and was born

on the 6th day of April, 1892. His present post-office address is Cold Spring, on Hudson, c/o Mr. Chalmers Dale."

Accepting the certificate of Representative McMillan as establishing these qualifications in the case of his nominee, the department entered the candidate's name on its records "as a legal nominee," and, under date of March 3, 1909, forwarded a permit for Douglas to take the mental and physical examination for admission to the United States Naval Academy, "as second alternate from the Twenty-first district of New York." Douglas subsequently passed the necessary examination and was appointed midshipman in the Navy, which appointment was accepted by him on September 2, 1909, at which time he took the oath of office as midshipman—the chief nominee having failed on his examination, and there being no first alternate.

Hon. Hamilton Fish, who succeeded Mr. McMillan as Representative from the Twenty-first district of New York, having instituted a personal investigation as to the qualifications of Midshipman Douglas for appointment from the Twenty-first district, and being satisfied that he was never an actual resident of that district, and his appointment was therefore void from the beginning, and should be so declared, has requested the Secretary of the Navy to submit this question to the President.

Section 1517, Revised Statutes, as amended by section 2 of the act of March 3, 1903 (32 Stat. 1198), requires that candidates for appointment to the Naval Academy from congressional districts must be actual residents of the district from which they are nominated. And all candidates must, at the time of their examination for admission, be between the ages of 16 and 20 years.

The act of June 29, 1906 (34 Stat. 578), provides as follows:

"Hereafter the Secretary of the Navy shall, as soon as possible after the 1st day of June of each year preceding the graduation of midshipmen in the succeeding year, notify in writing each Senator, Representative, and Delegate in Congress of any vacancy that will exist at the Naval Academy because of such graduation, or that may occur for other reasons and which he shall be entitled to

fill by nomination of a candidate and one or more alternates therefor. The nomination of a candidate and alternate or alternates to fill said vacancy shall be made upon the recommendation of the Senator, Representative, or Delegate, if such recommendation is made by the 4th day of March of the year following that in which said notice in writing is given, but if it is not made by that time the Secretary of the Navy shall fill the vacancy by appointment of an actual resident of the State, congressional district, or Territory, as the case may be, in which the vacancy will exist, who shall have been for at least two years immediately preceding the date of his appointment an actual and bona fide resident of the State, congressional district, or Territory in which the vacancy will exist and of the legal qualification under the law as now provided. In cases where by reason of a vacancy in the membership of the Senate or House of Representatives, or by the death or declination of a candidate for admission to the academy there occurs or is about to occur at the academy a vacancy from any State, district, or Territory that can not be filled by nomination as herein provided, the same may be filled as soon thereafter and before the final entrance examination for the year as the Secretary of the Navy may determine."

It appears from the papers in this case that, owing to the impossibility that the Secretary of the Navy can intelligently investigate and determine the qualification or eligibility of all candidates from all of the congressional districts in the United States, and the fact that the Representative from any district has superior means for ascertaining this, and especially whether the candidate is a resident of his district, it has long been the practice in that department to devolve upon the Representative in Congress the duty of ascertaining and reporting with his nomination, that his nominee has the required qualifications, including that of residence; and to act upon his statement, unless something to the contrary appears. This was done in the present case and all formalities and proceedings required by statute and navy regulations were observed. The statutory requirements as to residence

and age are as much directed to and obligatory upon the Representative making the nomination as they are with respect to the Secretary of the Navy in making the appointment. His infinitely better means and greater facilities for ascertaining whether his nominee is a resident of his district recommends this practice; and his interest in his constituents, many of whom would desire this place for their young sons, should insure due care that no mere squatter or sojourner by his recommendation should step into the place to which one of them is entitled. And the Secretary is not derelict in duty when he assumes that such Representative has performed his duty and reported correctly upon the qualifications and eligibility of his nominee; and the practice referred to can not be considered an unreasonable one.

It will be observed that while the act requires certain qualifications as to age and residence, it imposes no penalty for their nonobservance nor makes the appointment void in case it should turn out that the appointee was not within the prescribed ages or was not an actual resident of the district.

By the acts referred to the Secretary of the Navy is given sole jurisdiction to finally hear, determine, and adjudge all questions of qualification; and when jurisdiction is conferred to hear and determine questions of law, of fact, or of both, the judgment or decision is, upon general principles, final and conclusive, unless there is some provision for appeal or review.

And in all such cases, there must be a time within which all claims or contentions, that are to be made as to the facts or the law affecting the matter in hand, must be made, or be barred; and that time is while the question is being heard and considered. There must be a time when such determination becomes final, and is *res judicata* of all that is involved, and that time is when such decision is promulgated. The decision may be wrong, it may be founded upon a mistake of fact or of law, but it is none the less final and conclusive, unless provision is made for an appeal or a review.

I express no opinion as to how this would be in case it was charged that the decision was procured by the actual fraud of the party in whose favor it was made, as there is no such case here.

The first question presented is, how far action of the Secretary of the Navy in passing upon the qualifications and eligibility of young Douglas and of the President in appointing a midshipman is conclusive; or, in other words, whether the question of his residence is now open to inquiry:

It has long been the established doctrine that where jurisdiction to hear and determine a matter has been conferred upon any tribunal—legislative, executive, or judicial—its decision upon such matter is final and conclusive, unless some review is provided by law.

In *United States v. Arredondo* (6 Pet. 691), it is said, on pages 729 and 730:

"It is a universal principle, that, where power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive (1 Cranch 170-1), legislative (4 Wheat. 423; 2 Pet. 412; 4 *Ib.* 563), judicial (11 Mass. 227; 11 S. & R. 429, adopted in 2 Pet. 167-8), or special (20 Johns. 739-40; 2 Dow P. C. 521, etc.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."

This rule is not restricted to cases of collateral attack upon what has been thus decided, nor to questions of the validity of acts done by an appointee in the exercise of his office. It is equally so, whether the question is raised by direct or by collateral attack.

In *Belcher et al. v. Linn*, 24 How. 508, the court, referring to the above case, said (p. 522):

"We hold, as was held in that case, that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are in general binding and valid as to the subject-matter."

In *Bernards Township v. Morrison* (133 U. S. 523), it is said (p. 528):

"While it is true that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named. In the case of *Oregon v. Jennings* (119 U. S. 74, 92), the rule is thus stated by Mr. Justice Blatchford: 'Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the "corporate authorities" to act for the town in issuing them to the company, were the persons entrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with.'"

While in that case it was necessary to apply this principle only in a case where a *bona fide* purchaser was concerned, yet there is nothing in what the court said which restricted its application generally; and such a holding would be at variance with many other cases, federal and state, and at variance with the general doctrine.

In *United States v. California and Oregon Land Company* (148 U. S. 31), it is said (p. 43):

"Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive."

The court then refers to and quotes what is said in the *Arredondo* case, *supra*.

I think there can be no doubt that the acts referred to above made the Secretary of the Navy the sole final judge as to the qualifications and eligibility of this candidate. And when that was confirmed by a formal appointment, his determination of these matters was, in the absence of fraud, final and conclusive of the right of the candidate to hold the office. For I believe it to be a rule of universal application that when a statute empowers an officer or tribunal to appoint a person having certain qualifications, or who is eligible in certain respects, this is also the power—unless it is lodged elsewhere—to determine that the appointee has the required qualifications and is thus eligible. If it is not with such officer or tribunal it is nowhere.

The most of what has been here said is especially applicable to cases where the appointment is to an office of a fixed tenure, either for life or for a specified period. For in such cases, where the prescribed formalities have been observed, where the principal authority has passed upon the qualification and eligibility of the candidate and the President has appointed him, such officer, for the period fixed, is then, as is elaborately stated in *Marbury v. Madison* (1 Cranch 137), in every respect an officer. He is absolutely entitled, as against all the world, to hold the office and exercise its functions for the period prescribed.

In this and in all cases stated in this opinion, an exception is made wherever the appointment or the adjudication of his qualification or eligibility is procured by the fraud of the candidate; but in the absence of such fraud, no such officer can be removed from office unless by authority of some positive law, and this generally, if not universally, for something done or omitted after his appointment.

Still more especially does what is said apply to cases of appointment of officers in the Army or Navy, where peculiar conditions prevail.

While it is believed that the tenure of officers in the Navy has never been certainly fixed by any positive case, yet from the first it has been always conceded that they held their offices for life, unless forfeited by some subsequent act.

In the case of *Marbury v. Madison*, referred to above, many of the principles here involved are elaborately and carefully considered. That was an application for a writ of mandamus to compel the Secretary of State to deliver to the plaintiff his commission as a justice of the peace, which had been signed by the President and the seal of state affixed by the Secretary. The court held that the appointment was complete; that he was such an officer and entitled to hold and exercise the office for the term to which he had been appointed; that the appointment was irrevocable, and that the withholding of the commission was an invasion of the plaintiff's rights. The court held, also, that it had no original jurisdiction to issue the writ of mandamus, and that the act of Congress purporting to expressly confer such power was unconstitutional and void. Some of the statements there made are quoted here. Thus, on page 157, it is said:

"Some point of time must be taken, when the power of the Executive over an officer, not removable at his will, must cease. That point of time must be, when the constitutional power of appointment has been exercised. And this power has been exercised, when the last act, required from the person possessing the power, has been performed: this last act is the signature of the commission."

And on page 158 it is said:

"If it should be supposed, that the solemnity of affixing the seal is necessary, not only to the validity of the commission, but even to the completion of an appointment, still, when the seal is affixed, the appointment is made and the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of the Government. All that the Executive can do, to invest the person with his office is done; and unless the appointment be then made, the Executive can not make one without the cooperation of others."

And on page 162:

"But when the officer is not removable at the will of the Executive, the appointment is not revocable, and can not be annulled: it has conferred legal rights which can not be resumed. The discretion of the Executive is to be exercised, until the appointment has been made. But

having once made the appointment, his power over the office is terminated, in all cases where, by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute unconditional power of accepting or rejecting it."

And on page 167:

"If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed, can not be made never to have existed, the appointment can not be annihilated; and consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They can not be extinguished by executive authority, and he has the privilege of asserting them in like manner, as if they had been derived from any other source."

You request an opinion upon specially this question:

" * * * Whether, Mr. Douglas having been authorized by the department during a previous administration to take the necessary examinations for admission to the Naval Academy 'as second alternate from the twenty-first district of New York,' and having thereafter been regularly appointed as a midshipman in the Navy, I can now properly reopen the question of his residence at the time he was nominated."

In addition to what is said above as to the finality of the action of the Secretary, it must be observed that the fact of eligibility as required by the statute was determined under a previous administration. Mr. Douglas was nominated by the Representative on March 1, 1909, and was authorized to take the examination for admission to the academy on March 3, 1909. (Sec. 1515, Rev. Stats.) The actual appointment was made during the present administration; but the question of eligibility was determined under a former one. Under the general principle that "official acts of a previous administration are to be considered by its successor as final, so far as the Executive is concerned" (15 Op. 208), I think that you are concluded by the action of your predecessor. As was said by Mr. Attorney-General Harmon (21 Op. 344) in a case where a

a cadet had been appointed to the academy under a previous statute providing for appointment upon recommendation of a Representative, the Representative having afterwards been unseated in a contested-election case:

"As it appears from your statement that you acted on the recommendation while the Member who made it then actually represented his district in Congress, my opinion is that the matter has passed beyond your reach, and that, if the candidate passes the examination, he can not lawfully be deprived of his place."

Being of opinion, then, that you are without authority to reexamine this case or revoke the appointment, it is unnecessary for me to answer your other questions. I may say that if there occurred a vacancy by the removal of this midshipman, the vacancy could be filled, under the statute, only by the selective appointment of the Secretary. There would happen no case for nomination or recommendation by the Representative from that district.

"The nomination of a candidate and alternate or alternates to fill said vacancy shall be made upon the recommendation of the Senator, Representative, or Delegate, if such recommendation is made by the 4th day of March of the year following that in which said notice in writing is given, but if it is not made by that time the Secretary of the Navy shall fill the vacancy by appointment * * *." (34 Stat. 578.)

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

CORPORATION TAXES—PARTNERSHIPS—MUTUAL SAVINGS
BANKS.

Partnership associations, organized under the laws of Pennsylvania, possess every privilege and power essential to a corporation and are liable to the tax imposed under section 38 of the act of August 5, 1909 (36 Stat. 112).

Mutual savings banks, organized under the laws of West Virginia, while in a sense organized for profit, have not a capital stock represented by shares, and are not therefore subject to the tax imposed under section 38 of the act of August 5, 1909 (36 Stat. 112).

So-called savings banks which have a capital stock similar to other banking institutions, are not exempt from the tax imposed under section 38 of the above-cited statute.

DEPARTMENT OF JUSTICE,
February 14, 1910.

SIR: I have the honor to acknowledge receipt of your communications of January 22 and February 4, 1910, in which you ask my opinion with reference to whether or not certain business concerns fall within the provisions of section 38 of the act of August 5, 1909 (36 Stat. 112), which provides for an excise tax "with respect to the carrying on or doing business" by corporations, joint stock companies, and associations; and in my reply I will consider separately the several classes of concerns to which you refer, with the exception of certain realty associations to be dealt with in a separate opinion.

1. *Partnership associations, organized under the laws of the State of Pennsylvania.*

By reference to the Pennsylvania statutes, I find that the material provisions of the law under which such associations are organized are as follows: The association is formed by *three or more persons subscribing and contributing capital thereto, which alone shall be liable for the debts of the association*, and such persons sign and acknowledge a statement in writing which contains the names of the parties composing the association, *the amount of capital subscribed by each, the total amount of capital*, and when and how the same is to be paid, the character of the business to be conducted, and location of the same, the name of the association with the word "Limited" added as a part thereof, *the contemplated duration of the association* (which shall not in any case exceed twenty years), and the names of the officers of said association selected in conformity with the provisions of the act; which statement is recorded in the office of the recorder of deeds of the proper county.

The members of the association are not individually liable for the indebtedness thereof except if an execution is issued against the association and no property can be found, the court, after investigation, shall order the issuance of an execution against the members of the association, who

shall be liable to the extent of the capital subscribed *and remaining unpaid by them*. The word "Limited" shall constitute the last word of the name of the association. The interest of a member in the association is declared to be personal estate, *and it may be transferred, given, bequeathed, distributed, sold, and assigned*, under such rules and regulations as the association shall, from time to time, prescribe by a majority vote of its members in number and value of their interest; and, in the absence of rules and regulations, the transferee of an interest is not entitled to participate in the business of the association unless elected to membership by a vote of the majority of the members in number and value of interest. Any change of ownership which occurs in the absence of rules and regulations governing such transfer, and which is not followed by election to membership, entitles the transferee only to the value of the interest so acquired at the time of acquiring the same, at a price and terms to be agreed upon, and, in default of agreement, at a price and terms to be determined by an appraiser to be appointed by the Court of Common Pleas.

One meeting per annum is required of the association, and it is also required that there shall be elected not less than 3 nor more than 5 managers, who shall manage the affairs of the association, and it is prohibited from contracting any liability except by one or more of the managers. The association may divide the profits of the business in such manner and amounts as the majority of its managers may determine, which division shall not "diminish or impair *the capital of the said association*." It is prohibited from loaning its credit, name or capital to any member of the association. It may be dissolved by the expiration of the period fixed for its duration, or by a majority vote of its members in number and value of interest; and when dissolved, after paying its liabilities, the remainder of its assets shall be distributed in proportion to the interests of the members. It is authorized to adopt and use a common seal; and contributions to the capital may be made in real or personal property, at a valuation to be approved by all the members. All real

estate is held and owned in the name of the association, and it must "*sue or be sued in the association name*, and when suit is brought against any such association, service thereof shall be made upon the chairman, secretary, and treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association;" and service of process may also be had upon any agent, chief, or any other clerk, or upon any director or manager of such association in any county where the association may maintain or keep an office for the transaction of business.

The excise tax created by section 38 of the act of August 5, 1909, is made to apply to "every corporation, joint stock company, or association organized for profit and *having a capital stock represented by shares* * * * organized under the laws * * * of any State."

I have no doubt that an association organized as above shown, falls within the provisions of this act. Its organization is perfected under statutory authority, and while it is denominated a partnership association, yet it is given, as a separate entity, every privilege and power that is essential to constitute an incorporated body. In fact, some privileges are conferred which might have been omitted and still it would fall within the provisions of the act.

A similar question arose in the case of *Liverpool Insurance Company v. Massachusetts* (77 U. S. 566). A statute of the State of Massachusetts imposed a tax upon "each fire, marine, and fire and marine insurance company, *incorporated or associated* under the laws of any government or state other than one of the United States." It was insisted that this insurance company was not a corporation or association within the meaning of the statute. It appeared from an analysis of its articles of association, as authorized by the Parliament of Great Britain, that (1) it had a distinctive and artificial name by which it could make contracts; (2) that it could sue and be sued in the name of one of its officers, and the whole body was bound by the judgment; (3) that it had a provision for perpetual succession by transfer and transmission of its shares of

capital stock; and (4) that its existence as an entity, apart from its shareholders, was recognized by the act of Parliament, which enabled it to sue its shareholders and be sued by them. On the other hand, its individual members were liable for the debts of the company, and it could not be sued in its artificial name, and the act of Parliament under which it was organized expressly declared that such organization should not "be held to constitute the body a corporation." The court held that the organization was an artificial body which possessed all the essential elements of a corporation, and that the declaration in the act under which it was organized, that it should not be so considered, could not alter the fact, and therefore held that it was liable to the tax specified in the Massachusetts statute.

An association organized under the Pennsylvania statute has an artificial name in which all of its business is transacted, and by which it can sue and be sued; it has perpetual succession for the length of time specified in the articles of association, and while there is no positive provision which authorizes it to sue and be sued by a member of the association, yet there can be no doubt that any member of the association is at liberty to make a separate contract with it as a person, and that an action thereon could be maintained by either party; and that a right of action of any other kind might arise and be litigated between them. In addition to this, a member of the association is exempt from liability for its indebtedness, except as to the amount of capital subscribed by him.

Such an association also clearly falls within the definition of a corporation given by Mr. Justice Field in *B. & P. R. R. Co. v. Fifth Baptist Church* (108 U. S. 317, 330), to wit:

"Private corporations are but associations of individuals united for some common purpose, and permitted by law to use a common name, and to change its members without a dissolution of the association."

And also the definition given by the supreme court of New York in *People v. Assessors of Watertown* (1 Hill, 616, 620), which was quoted with approval by the supreme

court of Maine in *Sibley v. Penobscot Lumbering Association* (93 Me. 401):

“A corporation aggregate, is a collection of individuals united in one body, under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members for the time being one artificial person, or legal being, capable of transacting some kind of business like a natural person.”

And within the definition given by Chief Justice Marshall in the *Dartmouth College Case* (4 Wheat. 518, 636), that—

“A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”

The law creating this tax contains no special requirements as to what powers this artificial person shall possess, the only essentials being that it shall be organized under a law, that its object shall be for profit, and that it shall have a capital stock represented by shares. The capital of these associations is subscribed for in the usual way, and the members own an interest in the capital stock in proportion to the amount subscribed by them.

In *Cook on Corporations*, v. 1, section 12, it is said that a share of stock may be defined as—

“A right which its owner has in the management, profits and ultimate assets of the corporation.”

The interest of the members of the associations in question certainly falls within this definition. It is true that the issuance of certificates of shares is not required, but a certificate of stock is but a mere muniment of title, a mere evidence of ownership, and not the share itself.

“It operates to transfer nothing from the corporation to the stockholder, but merely affords to the latter the evidence of his rights. (*Cook on Corporations*, v. 1, section 13.)”

I am of the opinion, therefore, that associations organized under this Pennsylvania statute, are liable to the tax imposed under section 38 of the act of August 5, 1909.

2. *Mutual savings banks organized under an act for the incorporation of savings banks, passed by the legislature of West Virginia, February 21, 1887, and amended by the act of February 24, 1899.*

Such a bank may be organized by not less than 13 persons, citizens of the State, whose fitness for the proposed trust is certified to by the judge or judges of the circuit court of the county wherein the proposed savings bank is to be located. The form of the charter, and the method of procuring the same, is particularly set forth. From the incorporators, and those subsequently added thereto, 15 are selected by the body, on the approval of the judge or judges of the circuit court of the county, who constitute a board of trustees, and who have power to act for the corporation. These trustees elect from their number a president and vice-president, and appoint all necessary officers to transact the business of the bank. The bank, when organized, is authorized to receive any sum of money for deposit and to invest the same as authorized by the act, and the deposits, with dividends accrued thereon, are required to be paid to the depositors under rules and regulations to be adopted by the board of trustees. By section 24 it is provided that the income or profit of any such savings bank, after the deduction of all reasonable expenses incurred in the management thereof and the guaranty fund, shall be divided among its depositors or their legal representatives, at such times as may be fixed by its by-laws. There is no capital subscribed and the business consists in receiving deposits and investing the sum so received in accordance with the provisions of the charter and the by-laws adopted thereunder, and of repaying the depositors; and all the profits, after the payment of the necessary expenses, are divided among the depositors.

There is no question that such a concern is a corporation; but is it a corporation "organized for profit and having a capital stock represented by shares," as is required by the statute. In a certain sense, such a banking institution is organized for profit—that is, it affords a reasonably safe means for the investment of one's capital; but its organization and the transaction of its business is not for the profit of those who constitute its managing body, except in so far as they may be depositors. But the more serious question is, whether such an institution has a capital stock represented by shares. Can the depositors who place their money temporarily with such an institution, having no

right whatever to participate in its management, be regarded as shareholders, and the respective amounts deposited be considered as shares? I think an answer to these questions may be found in the following authorities.

The case of *Huntington v. Savings Bank* (96 U. S. 388, 392, 393, 394), involved an institution of precisely the same character. The suit was brought by an administrator of a deceased trustee, on the theory that he was entitled to a pro rata of the accumulated profits. In discussing the nature of the corporation, the Supreme Court, among other things, said:

"It is to be noticed that the charter does not authorize the creation of any corporate stock or capital, nor does it contemplate the existence of any other than the deposits which may be made. The corporators are not required to contribute anything. *There are, of consequence, no shareholders.* Not a word is said in the instrument respecting any dividends of capital, or even of profits, to others than the depositors. Certainly, no express authority is given to make dividends to the corporators; and we discover nothing from which such authority can be inferred."

And again:

"*The institution having no capital stock*, whatever liability, if any, there may be to the corporators must be satisfied out of the profits made from the deposits."

And with reference to the object of the corporation, it was said:

"It is not a commercial partnership, nor is it an artificial being the members of which have property interests in it, nor is it strictly eleemosynary. Its purpose is rather to furnish a safe depositary for the money of those members of the community disposed to intrust their property to its keeping. It is somewhat of the nature of such corporations as churchwardens for the conservation of the goods of a parish, the college of surgeons for the promotion of medical science, or the society of antiquaries for the advancement of the study of antiquities. Its purpose is a public advantage, without any interest in its members."

In *Hannon v. Williams* (34 N. J. Eq. 255, 258), the court, in considering the nature of a savings bank of this character, said:

"Savings banks differ widely in their objects, organization and character from ordinary banks and other joint stock companies. *They have no capital stock.* They are incorporated and organized not for the advantage of the corporators, but solely for the benefit of the depositors. Their object, as stated in some of the early charters of this State, is to receive and safely invest the savings of mechanics, laborers, servants, minors and others, thus affording to such persons the advantages of security and interest for their money, and in this way ameliorating the condition of the poor and laboring classes by engendering habits of industry and frugality.

"Properly organized and conducted, a savings bank is a quasi charitable and purely benevolent institution. Its only object, the safe keeping and provident investment of the funds of the depositors. The members of the corporation have no property interests in its funds, of which they are by law constituted the managers and guardians. The depositors, who alone are beneficially interested in the prosperity of the bank, have no voice in its management, nor even in the selection of the persons to whom its management is intrusted."

In *Savings Bank v. Town of New London* (20 Conn. 111, 117), the supreme court of Connecticut, in speaking of the nature of deposits in savings banks, said:

"*Deposits are not stock, within the most enlarged use of the word; nor are they regulated as such, but are more like deposits in other banks, drawing a stipulated interest. They are money put into the hands of trustees, to be loaned out; and whether it comes to the trustees from one man or many men, makes no difference in view of the law.*"

Mr. Justice Field, in *Bailey v. Clark* (88 U. S. 284, 286), in defining the capital of a corporation, said:

"When used with respect to the property of a corporation or association the term has a settled meaning; *it applies only to the property or means contributed by the stockholders as the fund or basis for the business or enterprise for which the corporation or association was formed;*" and the court therefore held that money borrowed from time to

time by a banker and temporarily used in the course of business, did not constitute a part of the capital of the bank.

I have been unable to find any authority in which it has been held that a savings bank, organized and doing business as is provided for by the laws of West Virginia, has a capital stock or that its depositors are shareholders.

In the case of *Hannon v. Williams, supra*, the court, in arriving at the conclusion that a depositor of a savings bank could not set off his deposit after the bank had failed against a liability to the bank created by a loan, likened a depositor's relationship in some respects to that of a stockholder as well as a creditor, saying that in prosperity they are the stockholders among whom the profits are divided, while in case of insolvency they are the creditors, among whom the remaining assets are to be distributed; but the court, as heretofore shown, held that such an institution has no real capital stock, and made this remark only by way of argument to show the rights of depositors in cases of the character there under consideration.

From the language of the act creating this excise tax, and the nature of these savings banks, I am constrained to hold that they are not subject to the tax imposed by section 38 of the act of August 5, 1909.

I hardly need add that this conclusion does not apply to so-called savings banks which have a capital stock as other banking institutions.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

CORPORATION TAXES—INTEREST PAID ON MORTGAGE.

In ascertaining the net income of a corporation holding and dealing in real estate, under section 38 of the act of August 5, 1909 (36 Stat. 112), interest on an indebtedness assumed by the corporation and secured by mortgage upon the properties which it acquires can be deducted only to an amount not exceeding the interest on the paid-up capital stock of such corporation.

Where a realty corporation takes title to real property subject to a mortgage, but does not assume the indebtedness secured thereby, the interest on such indebtedness should be deducted from the gross income of the corporation.

DEPARTMENT OF JUSTICE,

February 21, 1910.

SIR: I beg to acknowledge receipt of your communication of February 4, 1910, in which you ask my opinion whether, in ascertaining the net income of a corporation holding and dealing in real estate, the entire interest paid upon items of indebtedness secured by mortgages on such real estate should be deducted from the gross income, without reference to the amount of capital stock of such company.

This request is predicated upon a communication or brief presented by "Allied real estate interests of the State of New York and of allied real estate interests of the city of New York," signed by certain attorneys of the city of New York. I gather from the communication that "allied real estate interests" is not intended as the designation of any corporation or joint-stock company, but is intended to suggest that the inquiries propounded in this communication are of common interest to corporations dealing in real estate in the city and State of New York, and therefore a comprehensive ruling is requested, which shall be applicable to all cases coming within the general inquiry put. As to this, I might content myself with a reference to the position consistently adopted by my predecessors that opinions should not be rendered upon merely hypothetical or general questions, but only with respect to actual cases arising in the administration of the law by the respective departments. (9 Op. 82, 355, 421; 10 Op. 50; 13 Op. 531, 568; 19 Op. 331.) However, in view of the character of the statute under consideration and the great importance to many interests affected thereby, and the fact that the inquiries raised by this communication may be dealt with under two general propositions, I deem it expedient to express an opinion with respect thereto.

The so-called corporation-tax law (act of August 5, 1909, sec. 38, 36 Stat. 112) imposes a special excise tax upon the corporations, joint-stock companies and associations, and

insurance companies therein described, to be measured by 1 per centum upon the net income, which net income by the second paragraph is to be ascertained by deducting from the gross amount of such income received within the year from all sources certain specified items, among which only the two following are necessary to be considered as bearing on the present inquiry, viz:

“(First) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property.”

* * * * *

“(Third) interest actually paid within the year on its bonded or other indebtedness to an amount of such bonded and other indebtedness not exceeding the paid-up capital stock of such corporation, joint-stock company or association, or insurance company, outstanding at the close of the year, and in the case of a bank, banking association or trust company, all interest actually paid by it within the year on deposits.”

It is manifest that with respect to interest on “*its*” bonded or other indebtedness, the right of deduction and the limitation of that right must be found in the third paragraph above quoted, and that, however burdensome such limitation may appear to be to the particular companies affected thereby, it is nevertheless very clearly expressed by the act of Congress. It surely can not be assumed that Congress, having specifically set a limitation to the amount of interest upon the indebtedness of a corporation which may be deductible from its gross income in reaching the measure of the tax under this law, left the way open in the first clause to eliminate the limitation imposed by the third, so that if in any of the cases suggested by the allied real estate interests, the indebtedness secured by mortgage upon the properties acquired by the respective corporations shall have been *assumed* by them and has thereby become *their* indebtedness, interest on such indebtedness can be deducted only to an amount not exceeding the interest on the paid-up capital stock of the respective corporations. On the other hand, cases are suggested in the

communication submitted, where a realty corporation takes title to real property *subject* to a mortgage, but does not *assume* the indebtedness secured thereby. Under such circumstances, as is stated in the brief, "such mortgage is in no sense its indebtedness; the 'thing' itself, i. e., the real property and not the corporation, is liable for the mortgage and interest thereon; but in order that the corporation may maintain or keep possession of or not be ousted therefrom, the interest must be paid."

This would not be payment by the corporation owning the property subject to such lien of its own indebtedness, because the indebtedness is not "its" bonded or other indebtedness, but an indebtedness created by a third party and charged as a lien upon the land acquired, subject thereto, by the purchasing corporation. The interest accruing upon such charge or incumbrance would certainly fall within the description in the first clause of the second paragraph of the section under consideration as one of the "charges * * * required to be made as a condition to the continued use or possession of property," and therefore would be deductible as such.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

SALE OF OLD UNCANCELED OFFICIAL STAMPS CLOSELY
RESEMBLING POSTAGE STAMPS.

In the absence of statutory authority therefor, public policy forbids the sale of official stamps, uncanceled, which have become obsolete, but which resemble in general appearance ordinary postage stamps. If canceled, the objection would be removed.

DEPARTMENT OF JUSTICE,

February 23, 1910.

SIR: By your letter of the 4th instant you asked to be advised whether there is any legal objection to your department's selling certain old stamps in its possession to the highest bidder, and accounting for the proceeds in the usual way as miscellaneous receipts from the sale of condemned property.

It appears that the stamps referred to were issued under the authority of section 3915 of the Revised Statutes, as

amended by the act of February 27, 1877 (19 Stat. 240, 250). The amendment to that section provided:

"The Postmaster-General shall cause to be prepared a special stamp or stamped envelope, to be used only for official mail matter, for each of the executive departments; and said stamps and stamped envelopes shall be supplied by the proper officer of said departments to all persons under its direction requiring the same for official use; and all appropriations for postage made prior to March third, eighteen hundred and seventy-three, shall no longer be available for said purpose; and all stamps and stamped envelopes shall be sold or furnished to said several departments or clerks only at the price for which stamps and stamped envelopes of like value are sold at the several post-offices."

By an act approved March 3, 1877 (19 Stat. 319, 335-336), Congress authorized the free transmission through the mail of letters, packages, or other matters relating exclusively to the business of the Government of the United States, and provided for the use of what is known as the penalty envelopes for that purpose. By an act approved July 5, 1884 (23 Stat. 156, 158), section 3915 of the Revised Statutes was repealed so far as it related to stamps and stamped envelopes for official purposes.

The special stamps referred to have thus become obsolete. It appears that your department has about 63,000 of these stamps on hand, in denominations of 3, 6, and 10 cents. In regard thereto you say:

"It has been the custom of this department from time to time, upon application by the public, to give them specimens of these stamps, but the calls are so few and the number on hand so large that they will practically never be exhausted in this manner, and they are of necessity deteriorating. An examination of the catalogues of stamp collectors indicates that some of these stamps are listed at a value as high as 50 cents each."

In general appearance the particular stamps referred to by you closely resemble ordinary postage stamps. They are of about the same general shape, size, design, and color, and, while bearing the words "Dept. of the Interior, U. S.," are calculated to mislead the casual observer

into thinking that they are ordinary postage stamps, and susceptible of use as such. This being so, the question arises whether it would be proper to sell them in an uncanceled condition, as I assume you propose to do if there is no legal objection to such action.

It seems that no express authority has been given the executive departments to sell old or disused material and supplies. Such practice appears to have grown up, however, for reasons of economy, and is apparently recognized in the provisions of sections 197 and 3618 of the Revised Statutes, which provide for the accounting by government officers for moneys received from the sale of old material and supplies. This implied authority, however, resting as it does simply upon the ground that it is for the interest of the Government to make such disposition thereof, it seems to me is necessarily limited by the further principle that the sale of any such article will not be contrary to public policy. For example, in view of the statutes prohibiting and punishing the counterfeiting of the securities and current coin of the United States and providing for the seizure and forfeiture of the dies, molds, and other material used in the manufacture thereof, it would be manifestly contrary to public policy for any department of the Government to sell any such old and disused dies or molds.

I am therefore of the opinion that, in the absence of express authority to sell the stamps referred to, public policy, as further illustrated by the legislation of Congress forbidding the making of anything in the likeness of or similitude to the securities or obligations of the United States (sec. 177, *Crim. Code*; sec. 3708, *Rev. Stat.*), which terms have been declared to include stamps (sec. 147, *Crim. Code*; sec. 5413, *Rev. Stat.*), forbids the sale of the stamps referred to in an uncanceled condition. If canceled, there would be no such objection, as it would then be plain to everyone that they were not intended for use as postage.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

204 *Foreign Vessel Taking Tourists Around the World.*

COASTWISE CARRYING TRADE—FOREIGN VESSEL TAKING
TOURISTS AROUND THE WORLD AND LANDING AT DIFFERENT PORT.

Tourists taken on board the German steamship *Cleveland* at New York, carried around the world and landed at San Francisco, are not transported and landed in violation of section 8 of the act of June 19, 1886 (24 Stat. 81), as amended by the act of February 17, 1898 (30 Stat. 248).

DEPARTMENT OF JUSTICE,
February 26, 1910.

SIR: I have the honor to acknowledge receipt of your communication of the 19th instant, requesting an expression of my opinion upon the question whether section 8 of the act of June 19, 1886 (24 Stat. 81), as amended by section 2 of the act of February 17, 1898 (30 Stat. 248), has been violated by the German steamship *Cleveland* of the Hamburg-American Line, in landing at San Francisco, about 615 passengers, who were a party of tourists taken on board at New York for a trip around the world. In the course of the cruise the vessel stopped at seventeen ports, it being the purpose when the voyage was begun to disembark the passengers at San Francisco.

A history of the legislation upon the subject in question and the subject closely related thereto, to wit, domestic commerce in merchandise, will, I think, show the object of this statute.

In 1817 Congress enacted a law relating to the transportation of merchandise, which was brought into the Revised Statutes under the title "Vessels in domestic commerce," as section 4347, in the following form:

"No merchandise shall be transported under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power."

In *United States v. 250 Kegs of Nails* (61 Fed. 410), the Circuit Court of Appeals for the Ninth Circuit held that this statute did not include merchandise shipped from New York to Antwerp in one foreign vessel and afterwards forwarded by another vessel to a port in California, although the port in California was the objective point of shipment when the transportation was begun. This decision was rendered in 1894, but on February 15, 1893 (27 Stat.

455), after the case had arisen and before final decision therein, Congress amended said section by inserting after the word "power" the following:

"and the transportation of merchandise in any such vessel or vessels from one port of the United States to another port of the United States via any foreign port shall be deemed a violation of the foregoing provision."

Before the passage of the act of June 19, 1886, no similar provision applying to the carrying of passengers had been enacted, and section 8 of said act was inserted, which provided as follows:

"That foreign vessels found transporting passengers between places or ports in the United States, when such passengers have been taken on board in the United States, shall be liable to a fine of two dollars for every passenger landed."

The reason for the insertion of this provision was stated by the chairman of the Committee on Shipbuilding and Ship-owning Interests of the House of Representatives (Cong. Rec., 49th Cong., 1st sess., vol. 17, part 2, p. 1108), as follows:

"Section 8 imposes a penalty on a foreign vessel for transporting passengers between two ports of the United States. This has been rendered necessary by a construction which has been given to our laws imposing a penalty on foreign vessels for transporting merchandise between ports of the United States. Merchandise has been construed by the department to cover simply goods transported. In view of the construction which has been given, there seems to be no penalty provided for the conveyance of passengers between ports of the United States. There have been found no difficulties in this respect except with Canadian vessels on the Lakes, which have been accustomed during the summer season to come to the American side and convey excursion parties. And it has been suggested by the Treasury Department that the penalty which is provided by this section will be sufficient to break up the practice."

Said section 8 of the act of June 19, 1886, was amended by section 2 of the act of February 17, 1898, to read as follows:

"No foreign vessel shall transport passengers between ports or places in the United States, either directly or by

way of a foreign port, under a penalty of two hundred dollars for each passenger so transported and landed."

and by section 1 of the same act the following was enacted as a substitute for section 4347, Revised Statutes, as amended by the act of February 15, 1893:

"That no merchandise shall be transported by water under penalty of forfeiture thereof from one port of the United States to another port of the United States, either directly or via a foreign port, or for any part of the voyage, in any other vessel than a vessel of the United States. * * *

The object of the legislation contained in both sections 1 and 2 of the act of February 17, 1898, was fully explained in a communication from the Secretary of the Treasury to the chairman of the Committee on Commerce of the Senate, which was set forth in the report of the House committee (Cong. Rec., 55th Cong. 2d sess., vol. 31, part 2, pp. 1729-1730), and which in part is as follows:

"Section 1 is a stronger and more explicit statement of certain provisions of section 4347 of the Revised Statutes. It is not put in the form of an amendment to that section, as the revisers of the statutes saw fit to incorporate in that section certain legislation based on the treaty of Washington of 1871. The present validity of that legislation has for some years been disputed, and to avoid any legislative declaration on that dispute as a part of this measure, where it is not involved, the first section is drawn independently, though in effect it amends indirectly the other portions of section 4347.

"The essential amendment is in the words 'or for any part of the voyage.' The question has recently been put to the Treasury whether American goods consigned to Alaskan ports from Seattle can be carried in American vessels to Victoria, a distance of only 72 miles, and at Victoria be put on British vessels to be carried to Dyce, a distance of about 900 miles, or to St. Michael, a distance of about 2,000 miles. The Treasury Department has ruled that this is a violation of the laws reserving the coasting trade to American vessels. It is a palpable evasion of those laws, but in some quarters doubt is expressed whether

the courts will not decide, as they did in the case of a shipment of a cargo of nails from New York to Antwerp by a foreign vessel, and thence to San Francisco by another foreign vessel, that the law had been successfully evaded, not violated. That decision led to the amendment of Revised Statutes section 4347, by the act of February 15, 1893, prohibiting shipment 'via a foreign port.' That amendment, however, does not, perhaps, fully cover the transaction here referred to. The policy of the United States is to confine carrying by water for the whole voyage between American ports to American vessels. It is believed that section 1 explicitly affirms that policy and removes all doubt.

"Section 2. Section 8 of the act of June 19, 1886, imposes a penalty of only \$2 on foreign vessels carrying passengers from one to another American port. This small penalty is wholly inadequate to preserve the coastwise carrying of passengers to American vessels on the long and expensive voyages from the Pacific coast of the United States to Alaska, up the Yukon, etc. The penalty is increased to \$200. The penalty for the like offense imposed by the Canadian laws is \$400, and I respectfully suggest that the penalty proposed by this section may be increased to that maximum. In cases where this may seem excessive the Secretary of the Treasury has the power to mitigate it."

In further explanation of section 2, it was said in the report of the committee (Cong. Rec., 55th Cong., 2d sess., vol. 31, part 2, p. 1610):

"The charges for landing from San Francisco, for instance, up the Yukon River will be from \$200 to \$250, and the Canadian vessels would be delighted to pay the United States \$2 for every violation of the law and take our passenger trade. * * * This law is absolutely necessary to enable American vessels to do any of the passenger traffic."

It is apparent from the language of the legislation and the reasons assigned for its enactment that it was intended to apply to domestic commerce, and was not intended to affect commerce between this and foreign countries. This view is in accord with an opinion

prepared by Acting Attorney-General Jenks and transmitted to the Secretary of the Treasury on September 4, 1886 (18 Op. 445). The facts there under consideration were that a number of passengers were taken on board a foreign vessel at Cleveland, Ohio; they there paid their fare to Windsor, Canada, and after arrival at that port again paid fare to Chicago, to which port they were transported on the same vessel. It was held that, in the spirit of section 8 of the act of June 19, 1886, the voyage was a continuous one and that the act applied. The transportation of the passengers between the ports of Cleveland and Chicago via Windsor, Canada, was clearly domestic commerce, and therefore fell within the terms as well as the spirit of the act.

The primary question now under consideration, therefore, is whether the transportation of passengers from New York on a tour of sight-seeing around the world and to a port in California was domestic commerce, and I am of the opinion that it was not.

The object of this voyage was the landing of the vessel at numerous foreign ports to enable the passengers to visit various points in different parts of the Old World which are of special interest to tourists, and the return of the passengers to the port in California was a mere incident to this object, and so far as the nature of the commerce was concerned, it was precisely the same as if, after a voyage to Japan, they had been returned over the same route and relanded in New York. If one should take passage on a vessel at New York for Liverpool, and after transacting business in that city should again take passage on the same vessel on its return voyage and be landed in Boston, it certainly would not be insisted that the vessel would be subject to the penalty imposed by the statute; yet in principle no distinction can be seen between such a case and the facts now under consideration. In one instance the primary object would be to go to Liverpool on business and return to New York via Boston, while in the other, the primary object was to visit various parts of the world on a pleasure tour and then return home via California.

These views are in accord with administrative action in similar cases. In 1902 an assistant secretary of the Treasury held in effect that the act of 1898 applied to a state of facts similar to those here presented, but in 1903 the Secretary of the Treasury directed that action be suspended if tourists landed at American ports, and it is understood that no penalty was thereafter imposed by either the Treasury Department or the Department of Commerce and Labor until the present case arose.

The only judicial construction of the law relating to passengers is apparently the decision in 1904 of the District Court for the Western District of Washington in *United States v. The Foreign Steamer Princess Beatrice* (unreported), that the steamship was not liable to a penalty for bringing a passenger to Seattle from Victoria, British Columbia, where he had gone from Skagway, Alaska, on another foreign vessel.

I am of opinion, therefore, that the tourists taken around the world on the German steamship *Cleveland* were not transported and landed in violation of section 8 of the act of June 19, 1886, as amended by the act of February 17, 1898.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

IMPORTATION OF COPYRIGHTED BOOKS REBOUND
ABROAD.

Copyrighted books which have been printed from type set within the United States, and the printing and binding both performed within the limits thereof, may be rebound abroad and imported without violating section 31 of the copyright act of March 4, 1909 (35 Stat. 1082). A book is "produced" within the meaning of section 31 of the copyright act when it is printed and bound. Its manufacture is then completed and it becomes entitled to all the protection offered by the copyright laws.

NOTE.—Opinion of February 28, 1910, to the Secretary of the Navy, will be found on pages 635-644.

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DEPARTMENT OF JUSTICE,

March 1, 1910.

SIR: I have the honor to acknowledge receipt of your communication of the 10th ultimo, in which you request my opinion (1) as to whether copyrighted books which have been printed from type set within the United States, and the printing and binding both performed within the limits thereof, if sent abroad and rebound, are prohibited importations under the provisions of section 31 of the copyright act of March 4, 1909 (35 Stat. 1075), and if so (2) whether such books may be admitted to entry when not more than one copy is imported at one time for individual use and not for sale, under the first exception of subsection (d) of said section 31.

By section 15 of said act it is provided:

"That of the printed book * * * all copies accorded protection under this act * * * shall be printed from type set within the limits of the United States * * * and the printing of the text and binding of the said book shall be performed within the limits of the United States * * *."

By section 31 it is provided:

"That during the existence of the American copyright in any book the importation into the United States * * * of any copies thereof (although authorized by the author or proprietor) which have not been produced in accordance with the manufacturing provisions specified in section fifteen of this act * * * is hereby prohibited."

Manifestly a book is produced within the meaning of said section 31 when it is printed and bound, and the binding required to be done in the United States is the original binding, the one which enters into the original *production* of the book. When the manufacture of the book is thus completed, it is entitled to all the protection offered by the copyright laws, and it may be exported and thereafter imported at the pleasure of the owner and without any violation of section 31 of the act.

There is, furthermore, nothing in the act to indicate any intention that a book may be deprived of this protection or right of importation when it has once been acquired.

If it shall become necessary or proper that the book be rebound, it is not thereby made a new book but remains the same book, the one that was printed and originally bound in the United States as required by the statute.

I am of the opinion, therefore, that the rebinding abroad of a book copyrighted in the United States does not operate to exclude such book from reimporation.

This conclusion renders it unnecessary to discuss the second proposition.

Respectfully, .

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

CORPORATION TAX—FOREIGN STEAMSHIP COMPANIES
WHOSE VESSELS PLY BETWEEN AMERICAN AND FOREIGN
PORTS.

Foreign steamship companies engaged in the business of transporting passengers, goods, and merchandise between ports in this country and foreign ports, and maintaining passenger and freight agencies in this country, are corporations subject to the special excise tax created by section 38 of the act of August 5, 1909 (36 Stat. 112).

A tax imposed upon an exporter of merchandise as an incident to his business is not a tax upon the exported article, as an export, and hence is not violative of section 9, Article I, of the Constitution.

Passengers are not exports within the meaning of the above cited provision of the Constitution.

DEPARTMENT OF JUSTICE,

March 9, 1910.

SIR: I have the honor to acknowledge receipt of your communication of January 28, 1910, in which you inquire whether, in my opinion, foreign steamship companies engaged in the business of ocean transportation of passengers, freight, and mails in ships owned by them, plying between American and foreign ports, which companies maintain agencies in this country where passenger tickets may be bought and freight received for transportation, are corporations subject to the special excise tax provided by the act of August 5, 1909 (36 Stat. 112).

The act in question is, by its provisions, made applicable to all corporations organized under the laws of any foreign

country, which receive an income from business transacted and capital invested within the United States. But it is first insisted upon the part of these steamship companies that, inasmuch as the receiving and discharging of cargoes and passengers is a mere incident to the principal service rendered by them, which consists in the transportation of their cargoes and passengers over the high seas, they have no income derived from business transacted in the United States.

I am of the opinion that this contention can not be maintained. These companies have a large amount of capital invested in wharves, warehouses, and other facilities essential to carrying on their business in this country. Their business consists entirely in transporting passengers and goods and merchandise between ports in this country and those of foreign countries, and receiving and discharging the same. Through agents located here all contracts and arrangements incident to such a business at this end of their lines are made, and all exports are delivered to their warehouses and are loaded upon their vessels, and the passengers embark, while they are within the limits of the United States; and likewise while here their imports are unloaded and passengers from foreign ports disembark. If these companies do not transact business in the United States they transact no business in any foreign port, and their entire business is carried on upon the high seas. To such a conclusion I am unable to give assent.

It is next insisted that, inasmuch as they are engaged in the transportation of exports, the tax in question is a tax upon exports, and that the legislation is void as to them under that clause of section 9, Article I, of the Constitution, which provides that "No tax or duty shall be laid on articles exported from any State." In support of this contention the following cases are cited:

Brown v. Maryland (12 Wheat. 419), wherein the Supreme Court had under consideration a section of an act passed by the legislature of Maryland, which provided—

"That all importers of foreign articles or commodities, of dry goods, wares or merchandise, by bale or package, or of wine, rum, brandy, whisky and other distilled spirituous liquors, &c., and other persons selling the same by

wholesale, bale or package, hogshead, barrel or tierce, shall, before they are authorized to sell, take out a license as by the original act is directed, for which they shall pay fifty dollars."

The court held that this section, in so far as it applied to importers, was invalid, because it was in effect a tax levied by the State upon imports, which, under the Constitution, was prohibited.

Almy v. California (24 How. 169), wherein it was held that an act passed to provide revenue from a stamp tax on bills of lading for the transportation from any point or place in that State to any point or place without the State, of gold or silver coin, gold dust, or gold or silver in bars or other form, and which required that such stamp be attached to every such bill of lading or stamped thereon was invalid because it was the imposition of a tax upon exports.

Fairbank v. United States (181 U. S. 283), wherein it was held that the stamp tax on a foreign bill of lading provided for by the act of June 13, 1898 (30 Stat. 459), was equivalent to a tax on the articles for which the bills were given, and was violative of the above-quoted provision of the Constitution.

I am of the opinion that the principles decided in these cases are not applicable to the statute now under consideration. The tax imposed by this act is, as declared therein, "a special excise tax with respect to the carrying on or doing business" by the corporation; and I held in an opinion transmitted to you on January 13, 1910 (*ante*, p. 138), that it is not a tax on the property owned by the corporation, or on the income from such property, but is in the strict and constitutional sense an excise tax; and that, for that reason, the income from the interest on United States bonds should be computed in the gross income of a corporation, and should not be excluded in ascertaining its net income. If I was right in that conclusion, then this tax is not imposed upon exports carried by these steamship companies, or even upon the income derived from the transportation of such exports.

But, aside from this, I think there is a very material distinction between the present act and those involved in the cases above cited. The passengers carried by these

companies are not exports within the meaning of this clause of the Constitution. (*Crandall v. Nevada*, 6 Wall. 35.) And Congress has express power to tax imports. Consequently the revenues of these companies are derived from different classes of business, the larger portion of which is subject to taxation. The act does not undertake in its terms to make any distinction between the different kinds of business in which these or any other corporations embraced therein are engaged, but the tax is imposed upon them all alike, *not as exporters of merchandise*, but as an incident to their entire business. Such were not the facts in either of the cases cited.

In *Brown v. Maryland* (12 Wheat. 419), but two classes of persons were mentioned in the act, one importers of the articles designated, and the other wholesale dealers in those articles; and under its provisions an importer was required to pay the tax before a sale of the imported articles could be made, regardless of the size of the article or the amount sold. The act therefore imposed the tax upon the importer *as such*, he being subjected thereto *solely because he was the recipient for sale of imported articles*. A careful analysis of the reasoning of the court will show that the decision was rested upon this fact. In support of the holding that the prohibition to tax the imported article does not cease the moment it lands, the court used the following illustrations:

“The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require *every exporter* to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or, suppose revenue cutters were to be stationed off the coast, for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out

of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased, when they were carried out of the country?" (Page 445.)

It will be observed that the first illustration deals with the exporter *as such*, while the second deals directly with the exported article while in transportation. But the distinction is more clearly drawn in answering the contention that if the act be invalid, then an importer could, without being subject to a tax imposed by the State, sell his goods either as a retailer or peddler; or that silver plate imported for his own use would not be subject to taxation. The court upon this subject said:

"This indictment is against the *importer*, for selling a package of dry goods, *in the form in which it was imported*, without a license. This state of things is changed, if he sells them, or otherwise mixes them with the general property of the State, by breaking up his packages, and traveling with them as an itinerant peddler. In the first case, the tax intercepts *the import, as an import*, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated, until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property, by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer. So, if he sells by auction." (Page 443.)

Therefore the same article in the hands of the same person may be taxable or not, according to whether it still retains the character of an import.

So, in the other cases cited, the stamp tax was attached to the bill of lading which accompanied the exported article, and was, by the language of the acts, made applicable to exports *as such*.

On the other hand, in *Turpin v. Burgess* (117 U. S. 504) it was held that a stamp required to be affixed to every package of tobacco intended for exportation, before its removal from the factory, was constitutional, because the tobacco had not become an article of export; and in discussing the question, in referring to the two clauses of the Constitution wherein taxes upon exports are prohibited, and the States are prohibited from imposing, without the consent of Congress, taxes upon imports, the court said:

"The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or while they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the Constitutional prohibition." (Page 507.)

And, in *Cornell v. Coyne* (192 U. S. 418), wherein it was held that filled cheese was not exempted from taxation under this clause of the Constitution because manufactured expressly for exportation, the court quoted with approval the foregoing language of the court in *Turpin v. Burgess*.

It appears, therefore, that the validity of an act, under this clause of the Constitution, which taxes an article, depends not upon whether it will increase the price of the article when exported, but whether it is *taxed as an export*. In like manner and for the same reason, the validity of a tax imposed upon a business depends not upon the fact that, incidentally, along with its other business, the concern is engaged in exporting articles or carrying exports, and that the tax may thus incidentally increase the price of such articles, but whether it is laid upon an *exporting business as such*. If it were otherwise, and if the carrying of an article exempted from taxation under this clause also exempted the business of the carrier, then no tax could be imposed by either the United States or any State upon any of the principal railroad companies in the country, as all the main lines are daily engaged in carrying commerce which has been consigned to foreign ports to the

seaboard for shipment; and while being so carried, such commerce, if not being technically exported, is certainly "in the way of exportation" as suggested in *Turpin v. Burgess* (117 U. S. 508).

The question here under consideration should be carefully distinguished from that involved in the numerous cases in which taxes, either direct or indirect, imposed by States have been held unconstitutional under that clause which vests power in Congress to regulate commerce with foreign nations among the several States and with the Indian tribes. According to numerous decisions of the Supreme Court of the United States, this clause prohibits the States from interfering, *by any character of legislation*, with interstate commerce; and hence, any taxation which places a burden upon that commerce, and interferes therewith, is unlawful, regardless of whether it be a tax laid upon the transportation of the subjects of commerce, or upon the receipts derived from that transportation, or upon the occupation or business of carrying it on. This is not true, however, as to the clause here in question. For a tax to be violative of this clause it must be imposed upon the exported article, and the courts have never gone further than to hold that it is so imposed, within the spirit of this clause, when the tax may be directly traceable to such article *as an export*.

There appears another reason why these companies can not escape this tax. In *Aguirre v. Maxwell* (3 Blatch. 140, 141). it was insisted that a tonnage tax upon a foreign vessel was contrary to this provision of the Constitution; but the court held that—

"It is within the discretion of Congress to totally inhibit the import or export trade in foreign vessels to or from our ports, or to grant them the privilege of bringing in or carrying out cargoes on such conditions and under such regulations as may be regarded most beneficial to the United States."

And the tonnage tax remains to this day on our statute books, the last enactment being section 36 of the act of which the law under consideration is section 38. If the tax upon the tonnage, that is, the carrying capacity of the

vessel, is not a tax upon the merchandise it carries, then it can not be perceived how a tax "with respect to the carrying on or doing business" by the owner of the vessel can be a tax on such merchandise. Certainly the latter tax is further removed from the merchandise than the former. And if the owner of the foreign vessel can be made to pay the tonnage tax on account of the nationality of the vessel, there can be no reason why he can not be made to pay a tax on his business, when such business consists entirely in the transportation of passengers and merchandise in foreign vessels.

I am of the opinion, therefore, that the steamship companies in question are corporations subject to the excise tax created by section 38 of the act of August 5, 1909.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

ISTHMIAN CANAL COMMISSION—AWARD OF CONTRACT FOR FURNISHING OILS.

A contract for furnishing oils to the Isthmian Canal Commission may be awarded under the provisions of War Department circulars of December 11, 1909, and February 9, 1910, only to bidders who have acquired these products *bona fide* and in their own right and not as middlemen or agents of such companies as have been adjudicated parties to an unlawful trust and monopoly.

The advisory powers of the Attorney-General do not extend to an examination of evidence to ascertain what is established by a preponderance of testimony, nor can he settle facts *ex parte* from papers submitted and then proceed to give an opinion thereon.

DEPARTMENT OF JUSTICE,

March 17, 1910.

SIR: I have the honor to acknowledge the receipt of your letter of March 10 instant, in which you request an opinion whether a contract for furnishing oils to the Isthmian Canal Commission for the period covering June 30, 1910, to June 30, 1911, should be awarded to Motley, Green & Co., of 66-68 Broad street, New York City, bidders for said contract.

Bids for this contract were made in accordance with your regulations, and "under any phase of award" this company are the lowest bidders. It is admitted that they would be entitled to the award unless disqualified by reason of the provisions of your circular of December 11, 1909, which provides:

"The Standard Oil Company of New Jersey and the other companies named in section 2 of the decree of the United States Circuit Court, Eastern District of Missouri, entered November 20, 1909, having been adjudicated parties to an unlawful trust, are hereby brought within the scope of directions heretofore given that no purchase on behalf of the Government be made directly from any corporation which has been adjudicated to be a party to an unlawful trust and monopoly and to be carrying on business in violation of law, nor from any middleman or agent of such company or concern where it is known that such middleman or agent is acting for such unlawful concern."

I am also referred to your circular of February 9, 1910, which is as follows:

"In the matter of directions heretofore or hereafter given forbidding purchases on behalf of the Government from persons or corporations that have been adjudicated parties to an unlawful trust, it is hereby ordered that unless otherwise expressly stated such directions shall, in accordance with a holding by the Attorney-General in a similar case, not be construed so as to forbid the purchase of goods made by such persons or corporations adjudicated to be a party to an unlawful trust from those who, *bona fide* and in their own right, have acquired the title to the same, and who are not middlemen or agents of such persons or corporations."

It appears from a letter accompanying the bid, or written on the same day to the officer inviting the bids, that Motley, Green & Co. stated:

"* * * We beg herewith to advise you that we have no connection or affiliation in any manner whatever, either as agents or otherwise, with the Standard Oil Company or any of its allied or affiliated companies. The oils which

we propose to furnish under this circular, if the contract is awarded us, are the manufacture of the Galena Signal Oil Company, and purchased by us in the ordinary course of trade. We are not their agents, nor have we any connection with them directly or indirectly, expressed or implied, except in the relation of one merchant toward another. We have made this bid upon our own responsibility, and on our own account, and they have no interest in it in any way, shape, form, or manner."

The Galena Signal Oil Company was one of the companies named in the decree referred to in your circular as an unlawful trust.

Motley, Green & Co., in a letter addressed to you, dated March 5 instant, stated the facts of their connection with the Galena Signal Oil Company as bearing upon this contract. They say:

"We have no connection whatever in any way with the Standard Oil Company or any of its subsidiary or allied concerns. On or about the 10th of January last the president of our company, Mr. Motley, saw the vice-president of the Galena Signal Oil Company, and asked him whether they (the Galena Company) were going to bid on the forthcoming circular for annual supplies, to be issued by the Isthmian Canal Commission. The Galena Oil Company stated that they were not going to do so—that under a ruling of the department their bid would not be considered. Our Mr. Motley then asked if they were disposed to furnish us with prices which we could use in making up a bid to the Isthmian Canal Commission, and was informed that they would do so, and that as soon as the definite specifications were in hand, they would take the same up, furnish us with prices, and give us such other facilities as might lie in their power to assist us in obtaining the business. In accordance with this understanding, the prices were submitted, samples were prepared, and our bid was duly opened * * *."

The position of Motley, Green & Co. in relation to the contract is fairly stated. It is plainly shown, as you state,

“that they did not own the oil which they proposed furnishing at the time they made their bid, and that they entered into a contract with the Galena Signal Oil Company, by virtue of which they expect deliveries to them from that company from time to time to fill the contract with the Isthmian Canal Commission, in case the award shall be made to them.”

That parties offering to furnish supplies or products for future deliveries over a considerable period of time under a contract have not the same in ownership at the time of bidding or even of entering into the contract is a common occurrence in business transactions. You say, in connection with this matter, “it should be stated that it is doubtless the fact that no bidder owned, at the time of making the bid, the oils which would be delivered under the contract.”

In their letter of March 5, 1910, however, Messrs. Motley, Green & Co. say: “We have a valid contract with the Galena Signal Oil Company for the supply of these oils and are in a position to call upon them for the same at any time. They have no interest in our contract in any way whatever.”

It is not disclosed in the papers submitted where any of the bidders other than Motley, Green & Co. are to obtain the supplies bid for. Some of them may be manufacturers. Others certainly are not. These will purchase oils, to fulfill their contracts, to their own best advantage. It will hardly be supposed that the Government can investigate all the sources from which these products are obtained.

Upon this statement of facts I can only advise that if in your opinion Messrs. Motley, Green & Co. have acquired *bona fide* and in their own right the supplies proposed to be contracted for and are not middlemen or agents for the Galena Signal Oil Company or any of the other corporations enumerated in your circular of December 11, 1909, then there is no reason why you should not award the contract to them. The advisory powers of the Attorney-General do not extend to an examination of evidence to ascertain what is established by a preponderance of testi-

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mony (17 Op. 172), nor can he settle facts *ex parte* from papers submitted and then proceed to give an opinion thereon (18 Op. 487; 19 Op. 672). The question involved would appear to turn wholly upon a conclusion of fact as to the *status* of the bidder to be made from such evidence as you can procure, and to involve therefore the exercise of judgment and discretion by you with which I can not under the law or with propriety interfere.

Very respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

COPYRIGHT LAW—FOREIGN AUTHORS—PROCLAMATION
OF THE PRESIDENT.

A foreign author or proprietor, not domiciled within the United States at the time of the first publication of his work, is not entitled to the benefits conferred by the copyright act of March 4, 1909 (35 Stat. 1075), until after the President has issued a new proclamation declaring the existence of the reciprocal conditions set forth in that act. A previous proclamation under the act of March 3, 1891, sec. 13 (26 Stat. 1110), is not sufficient.

In such a case the proclamation issued by the President does not create the right of foreign authors or proprietors to enjoy the privileges of our copyright laws, but is only the evidence of the existence of conditions under which those rights and privileges may be exercised, and is conclusive evidence on that point.

The new proclamations may be retroactive in terms and effect.

DEPARTMENT OF JUSTICE,

March 19, 1910.

SIR: I have the honor to acknowledge receipt of your communication of March 7, 1910, in which you ask my opinion upon the following questions:

1. Is it necessary, in order that the benefits conferred by the copyright act of 1909 may be enjoyed by an alien author or proprietor (not domiciled within the United States at the time of the first publication of his work), that new proclamations shall be issued by the President in

the case of those countries as to which proclamations have already been issued under the previous law?

2. If the answer to this question be in the affirmative, may such new proclamations be retroactive in terms and effect?

In response thereto I will say:

By section 13 of the act of March 3, 1891 (26 Stat. 1110), by which many of the sections of the copyright law as it appeared in the Revised Statutes were amended, it was provided:

"That this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the President of the United States by proclamation made from time to time as the purposes of this act may require."

The act of March 4, 1909 (35 Stat. 1075), is entitled "An act to amend and consolidate the acts respecting copyright," and it was manifestly the purpose of Congress to embrace therein all the laws upon the subject; and by the proviso to section 8, which relates to authors or proprietors who are citizens of foreign states or nations, it is provided:

"*Provided, however,* That the copyright secured by this act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only:

"(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

"(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either

by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

“The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this act may require.”

The question is whether, if publication as to certain foreign countries was, before the passage of the act of 1909, made by the President, as required by the act of 1891, it is necessary for another publication to be made under said latter act before the benefits conferred thereby can be enjoyed by an author or proprietor who is a citizen of a foreign state or nation, and who was not domiciled within the United States at the time of the first publication of his work.

The act of 1909 not only embraced all, or substantially all, the principal features of the previous copyright laws, but it adds several material provisions thereto. For illustration, in paragraph (e) of the first section there are found provisions with reference to the reproduction of music upon mechanical instruments, etc., which nowhere appear in the previous laws, and it is there provided:

“That the provisions of this act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after this act goes into effect, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject, grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights.”

Since, therefore, material and important provisions have, by this act, been added to the copyright laws, and all of the old provisions which remain in force are embraced therein, and since all rights and privileges which may now be enjoyed under the copyright laws must be secured *under the provisions of this act* and not of any former laws, it is fair to presume that, when Congress provided by express terms that the existence of certain conditions should be determined and proclamation thereof made by the President before foreign authors or proprietors can enjoy the privileges of a copyright *secured by this act*, a determination and proclamation under *this act* was contemplated, and that a previous proclamation under a former act is not sufficient.

This conclusion is further strengthened by the fact that there is a material difference in the requirements of the present law and that of 1891. By that act the conditions under which a foreign citizen or subject might procure the rights and privileges of the copyright law were that the foreign state or nation of which he was a citizen or subject permit to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens or subjects, or that such foreign state or nation be a party to an international agreement which provides for reciprocity in the matter of copyright, by the terms of which agreement the United States, at its pleasure, might become a party thereto; while in the last act, to these conditions is added the further one in the alternative, that such foreign country afford to citizens of the United States copyright protection substantially equal to the protection secured to the foreign author under this act, or by treaty; and, as above shown, with reference to the reproduction of music by mechanical instruments, rights similar to those given by this act must be granted to citizens of the United States. And, since this last-mentioned condition was not in the previous laws, a proclamation thereunder by the President can be no evidence that it is complied with by a foreign state or nation.

I am of the opinion, therefore, that it was contemplated by Congress that a new inquiry should be made by the President with reference to the status of American authors and proprietors under the copyright laws of foreign countries, and that publication of such finding should be made in order to entitle foreign authors and proprietors to the advantages of the copyright laws of this country.

It will be observed that the determination of the specified conditions of the foreign laws and the proclamation of the President made with reference thereto does not *create* the right of foreign authors and proprietors to enjoy the rights and privileges of our copyright laws, but that such proclamation is only the *evidence* of the existence of the conditions under which those rights and privileges may be exercised. It is true that the absence of such proclamation is conclusive evidence that such rights do not exist, while, on the other hand, the proclamation is conclusive evidence that they do exist; but, nevertheless, the proclamation is not a condition precedent to the existence of the rights themselves. Therefore, there is no reason why such proclamation may not be retroactive in its effect; and, consequently, if a proclamation were made showing the determination of fact by the President that either of the conditions required in the statute have been complied with since a specified date, such proclamation would be conclusive evidence of that fact, and the citizens or subjects of such country would be entitled to avail themselves of our copyright laws from the date mentioned in the proclamation. It was unquestionably recognized by Congress that it would require some time for the President to make the proper investigation and to publish a proclamation of the conditions found; and it can not be believed that Congress intended to deprive the citizens or subjects of a foreign state or nation, which had complied with the provisions of the statute, of the privileges of the American copyright laws while such investigation was pending.

I therefore answer your second inquiry in the affirmative.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF STATE.

CENSUS OFFICE—CITIZENSHIP OF ENUMERATORS AND INTERPRETERS.

The provision of section 10 of the permanent census act of March 6, 1902 (32 Stat. 53), which prohibits the employment in the Census Office of persons other than citizens of the United States, does not prevent the employment of persons as enumerators and interpreters who are not such citizens.

The provision referred to was not, however, repealed by the act of July 2, 1909 (36 Stat. 1).

The expression "All employees of the Census Office," in section 10 of the census act of 1902, does not relate to enumerators or interpreters.

DEPARTMENT OF JUSTICE,

March 19, 1910.

SIR: I have the honor to acknowledge receipt of your communication of March 4, 1910, wherein you ask my opinion upon the following questions:

1. Whether the provision in section 10 of the act of March 6, 1902 (32 Stat. 53), that "All employees of the Census Office shall be citizens of the United States," applies to any appointments made for the purpose of taking the Thirteenth Census, as provided for by the special Thirteenth Census act of July 2, 1909;

2. If it does apply, should it be so construed as to prevent the employment of persons to act as interpreters and enumerators who are not citizens of the United States; and

3. Whether the exceptional conditions which prevail in Porto Rico and Hawaii are not of sufficient importance to justify the assumption that it was not the intent of Congress that the provision relative to citizenship should apply to those islands.

In reply thereto I will say:

Section 17 of the act of March 3, 1899 (30 Stat. 1019), entitled "An act to provide for taking the Twelfth and subsequent censuses," reads as follows:

"That the special agents appointed under the provisions of this act shall have equal authority with the enumerators in respect to the subjects committed to them under this act, and shall receive compensation at rates to be fixed by the Director of the Census: *Provided*, That the same shall in no case exceed six dollars per day and actual neces-

sary traveling expenses and an allowance in lieu of subsistence not exceeding three dollars per day during their necessary absence from their usual place of residence: *And provided further*, That no pay or allowance in lieu of subsistence shall be allowed special agents when employed in the Census Office on other than the special work committed to them, and no appointments of special agents shall be made for clerical work."

The act of March 6, 1902, was entitled "An act to provide for a permanent Census Office," and section 10 thereof (32 Stat. 53) amended section 17 of the act of 1899 above quoted by adding thereto the following:

"* * * *And provided further*, That the Director of the Census is hereby authorized in his discretion to employ the clerical force of the Census Office for such field work as may be required to carry out the provisions of sections seven, eight, and nine, in lieu of employing special agents for that purpose; and such employees when so employed shall be allowed, in addition to their regular compensation, actual necessary traveling expenses and an allowance in lieu of subsistence not exceeding three dollars per day during their necessary absence from the Census Office. *All employees of the Census Office shall be citizens of the United States.*"

On July 2, 1909 (36 Stat. 1), Congress passed an act entitled "An act to provide for the Thirteenth and subsequent decennial censuses," and the eighteenth section of this act provides for the appointment by the Director of the Census of special agents, and with reference to the authority of such special agents and the payment of their compensation and expenses, its provisions are substantially the same, or at any rate cover the same ground, as section 17 of the act of 1899 as amended by section 10 of the permanent census act. But there is omitted from this section the provision that all employees of the Census Office shall be citizens of the United States.

By section 33 of the act of 1909 (36 Stat. 10) it was provided—

"That the act establishing the permanent Census Office, approved March sixth, nineteen hundred and two, and acts

amendatory thereof and supplemental thereto, except as are herein amended, shall remain in full force. That the act entitled 'An act to provide for taking the Twelfth and subsequent censuses,' approved March third, eighteen hundred and ninety-nine, and all other laws and parts of laws inconsistent with the provisions of this act are hereby repealed."

The first question therefore is, whether or not the provision with reference to the citizenship of employees of the Census Office is repealed by the act of 1909.

I am of the opinion that it is not. As shown, it is expressly provided in the act of 1909 that the permanent census act shall remain in force, except as therein amended. There is no express language in the act of 1909 repealing the provision in question, and I think the fact that section 18 of the act of 1909 covers, with the exception of this provision, the same ground as section 10 of the permanent census act, does not work a repeal of this provision by implication. It is a well-recognized principle that in order for a later statute to repeal by implication a former statute or any portion thereof, "there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy." (*Chew Heong v. United States*, 112 U. S. 536, 549; *Wood v. United States*, 16 Pet. 342, 362; *State v. Stoll*, 17 Wall. 425, 431.)

This provision is not a part of the last proviso, nor is it intimately connected with the section in which it appears, but is an entirely independent provision, and its existence does not at all depend upon a repeal of that which goes before. Clearly, section 18 of the last act is a substitute for the remaining portions of said section 10 of the permanent census act, and by implication repeals the same; but this provision is just as consistent with section 18 of the last act as with section 10 of the former act, and consequently was not repealed thereby.

It becomes necessary, therefore, to determine the scope and meaning of the expression "Census Office" in this provision; and I think that may be readily determined

from the use of this same expression as it appears in the immediate context. The expression appears three times elsewhere in this section; first in the second proviso, wherein it is provided that no pay or allowance in lieu of subsistence shall be allowed special agents when employed in the *Census Office* on other than the special work committed to them; it again appears in the third proviso where the Director of the Census is authorized, in his discretion, to employ the clerical force of the *Census Office* for such field work as may be required to carry out the provisions of sections 7, 8, and 9; and it also concludes this same proviso wherein it is declared that in addition to the regular compensation, the clerical force shall be allowed actual and necessary traveling expenses and an allowance in lieu of subsistence not exceeding \$3 per day during their absence from the *Census Office*. Clearly, the expression as thus used in each instance has reference to the employees in the Census Office located in Washington, and has no relation to enumerators or interpreters who are appointed by the supervisors of census, with the consent of the Director of the Census; and I think it has the same meaning in the provision in question. In fact, these employees are not provided for in the permanent census act, and the positions were specially created by the act of 1909 for the purpose of taking the Thirteenth Census.

The expression also often appears in other portions of the act, but it is not deemed necessary to analyze and determine what its meaning is as it elsewhere appears.

I am of the opinion, therefore, that the provision of the permanent census act which prohibits the employment in the *Census Office* of other persons than citizens of the United States, does not prevent the employment of persons as enumerators and interpreters who are not such citizens; and this, as I understand, is a sufficient answer to the three questions propounded.

Respectfully,

GEORGE W. WICKERSHAM,

THE SECRETARY OF COMMERCE AND LABOR.

ISTHMIAN CANAL COMMISSION—AWARD OF CONTRACT
FOR FURNISHING OILS.

A contract for furnishing oils to the Isthmian Canal Commission may be awarded under War Department circular of December 11, 1909, to a bidder who, at the time the contract is entered into, satisfactorily shows that he has acquired these products *bona fide* and in his own right, either in immediate possession or for future delivery. The contract is not vitiated if these supplies are to be obtained from a prohibited company, provided that company has no interest whatever in the sale to the Government.

DEPARTMENT OF JUSTICE,

March 23, 1910.

SIR: Replying to yours of 22d instant, in which you ask for the proper interpretation of a sentence quoted from my previous communication, dated March 17, 1910, ante, 218, I beg to say that the position of Messrs. Motley, Green & Co., set forth in your letter of March 10, 1910, which is quoted in my previous communication, is:

“That they did not own the oil which they proposed furnishing at the time they made their bid, and that they entered into a contract with the Galena Signal Oil Company by virtue of which they accept deliveries to them from that company from time to time to fill the contract with the Isthmian Canal Commission in case the award shall be made to them.”

In their letter of March 5, which is also quoted in my previous communication, they say:

“We have a valid contract with the Galena Signal Oil Company for the supply of these oils, and are in a position to call upon them for the same at any time. They have no interest in our contract in any way whatever.”

It was upon this statement of facts that I advised:

“That if, in your opinion, Messrs. Motley, Green & Co. have acquired, *bona fide* and in their own right, the supplies proposed to be contracted for, and are not middlemen or agents for the Galena Signal Oil Company, or any of the other corporations enumerated in your circular of December 11, 1909, then there is no reason why you should not award the contract to them.”

Perhaps, to have been absolutely accurate, I should have said “if, in your opinion, Messrs. Motley, Green & Co.

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shall have acquired *bona fide*, etc.," but I was predicating my observations upon their statement that they had a valid contract. Speaking generally, what I meant to say was that if at the time Messrs. Motley, Green & Co. enter into a contract with the Government they shall satisfy you that they have acquired, *bona fide* and in their own right, either in immediate possession or for future delivery, the supplies which they agree to sell and deliver to the Government, then the fact that they are to obtain those supplies from one of the prohibited companies, that company, however, having no interest whatever in the sale by them to the Government, you would not be prevented from awarding the contract.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

PUBLIC PRINTER—ABOLITION OF BRANCH PRINTING OFFICES.

The Public Printer can not, of his own motion, abolish any branch printing office, nor can he, with the consent of the Joint Committee on Printing, abolish any branch printing offices other than the excepted offices enumerated in section 31 of the act of Jan. 12, 1895 (28 Stat. 601).

DEPARTMENT OF JUSTICE,

March 28, 1910.

SIR: I am in receipt of a letter addressed to you by the Public Printer, under date of March 23, 1910, in which he requests my opinion as to whether or not the Public Printer is authorized by law to abolish, of his own motion, any of the branch printing offices under his control, and what offices may be abolished by the Public Printer with the approval of the Joint Committee on Printing.

The powers and duties of the Public Printer are prescribed by the general printing act of January 12, 1895, entitled "An act providing for the public printing and binding and the distribution of public documents." (28 Stat. 601.)

NOTE.—Opinion of March 23, 1910, to the President, may appear in a later volume.

Section 17 of that act provides for the appointment of a Public Printer, and his duties are prescribed in different sections of the act; in fact, almost every section contains some provision which imposes upon the Public Printer a duty or confers upon him a power. Section 31 is the only provision of the statute dealing with printing offices and branches. It is in the following language:

"All printing offices in the departments now in operation, or hereafter put in operation, by law, shall be considered a part of the Government Printing Office, and shall be under the control of the Public Printer, who shall furnish all presses, types, imposing stones, and necessary machinery and material for said offices from the general supplies of the Government Printing Office; and all paper and material of every kind used in the said offices for departmental work, except letter and note paper and envelopes, shall be supplied by the Public Printer; and all persons employed in said printing offices and binderies shall be appointed by the Public Printer, and be carried on his pay roll the same as employees in the main office, and shall be responsible to him: *Provided*, That the terms of this act shall not apply to the office in the Weather Bureau, or, to so much of the printing as is necessary to expedite the work of the Record and Pension Division of the War Department nor to the printing office now in operation in the Census Office; but the Public Printer, with the approval of the Joint Committee on Printing, may abolish any of these excepted offices whenever in their judgment the economy of the public service would be thereby advanced.

"All work done in the said offices shall be ordered on blanks prepared for that purpose by the Public Printer, which shall be numbered consecutively, and must be signed by some one designated by the head of the department for which the work is to be done, who shall be held responsible for all work thus ordered, and who shall quarterly report to the head of the department a classified statement of the work done and the cost thereof, which report shall be transmitted to the Public Printer in time for his annual report to Congress. The Public Printer shall show in detail, in his annual report, the cost of operating each departmental office."

The only power conferred in this section, with respect to the abolition of any office, is that found in the proviso under which the Public Printer "with the approval of the Joint Committee on Printing may abolish any of" the three offices excepted from the main provisions of the section, viz: (1) The office in the Weather Bureau; (2) the printing office necessary to expedite the work of the Record and Pension Division of the War Department; (3) the printing office in the Census Office—abolished by operation of the act of July 1, 1902.

No power is conferred upon the Public Printer, of his own motion, to abolish any branch printing office; nor, with the consent of the Joint Committee on Printing, to abolish any except the above-mentioned excepted offices. On well-settled principles, the specific expression of power in the given cases implies absence of the power in any but the excepted cases, and, in general, the act vests the printing offices of the Government "under the control of the Public Printer," obviously for the purposes of operation and not suppression.

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

CORPORATION TAX—SNOW ASSOCIATES, DEPARTMENT
STORE TRUST, ETC.

Companies known as the Snow Associates, the Department-Store Trust, the Real Estate Trust, etc., organized under and by an agreement and declaration of trust for the purpose of improving and holding real estate, the title to which is vested exclusively in trustees who are removable by vote of the stockholders, and the stock being transferable, which companies possess all of the essential elements of a common-law joint stock company, are "joint stock companies or associations organized for profit and having a capital stock represented by shares," organized under the laws of a State, within the intent of section 38 of the act of August 5, 1909 (36 Stat. 112) and are amenable to the tax imposed thereby.

By the expression "laws of a State," as used in statutes, reference may be had to the common law as well as to the statutory law of such State.

DEPARTMENT OF JUSTICE,

March 31, 1910.

SIR: In your communication of February 4, 1910, you ask my opinion with reference to whether certain business concerns which are known as the Snow Associates, the Department Store Trust, the Farlow Real Estate Trust, and the Bromfield Building Trust fall within the provisions of section 38 of the act of August 5, 1909 (36 Stat. 112), which provides for an excise tax with respect to the carrying on or doing business by corporations, joint stock companies, and associations; and in reply thereto I have the honor to say:

All of these companies have the same general plan of organization, and the Snow Associates will be taken as an example.

This company was organized under and by an agreement and declaration of trust which contained the following provisions: The purpose of the trust was the improving and holding of four parcels of real estate which were particularly described, and the title thereto was vested in three persons, as trustees, who were to perform their duties under the powers granted by the declaration of trust. The title to the property was vested exclusively in the trustees, so that the shareholders are without interest therein other than that conferred by their shares issued under the terms of the trust, and have no right to call for partition, accounting, or division of the property, rights, or interests. The capital is \$1,224,000, divided into shares of \$100 each. The trustees issued certificates to the shareholders for the number of shares to which each was entitled. In addition to the shares, amounting to \$1,224,000, the trustees retained in their hands shares of the par value of \$100,000 for the purpose of raising funds to improve the property and to purchase additional real estate, to pay for mortgages, etc. At meetings of the shareholders each share is entitled to one vote. Shareholders may transfer their shares on surrender of their certificates, upon books to be kept by the trustees, in the manner usual for the transfer of shares of stock of corporations, or in such other manner as the trustees may

prescribe. The death of a shareholder does not terminate the trust or give his legal representative a right to an accounting or to take any action in the courts or otherwise against the shareholders, but entitles the legal representative of the deceased to receive a new certificate in place of the certificate held by the deceased. No assessments can be made upon the shareholders, and the instrument contains a stipulation that they are exempt from personal liability on account of contracts entered into or torts committed by the trustees. The shareholders meet annually, and they have also such special meetings as may be called by the trustees. The shareholders at such meetings fill vacancies in the number of trustees, and may depose any or all of the trustees and elect others in their place. The trustees are empowered to execute instruments which are conclusive upon the associates. The trust shall continue for twenty years after the death of the last surviving original subscriber; provided that a majority in interest of the total number of shares may direct a sale of the property at any time, and upon such sale and distribution among the shareholders in proportion to their interest, the trust shall be terminated. The trustees are vested with full power of leasing and letting, and have exclusive management of the property, and can borrow money for temporary exigencies, which shall bind the assets of the trust but not the shareholders individually. They also have the power to mortgage the property for a sum not exceeding \$100,000 for the purpose of making improvements or to extinguish liens; and they determine the amount of net income and declare such dividends as in their opinion may be judicious, and invest in such manner as they see fit any moneys which they may have on hand.

This association possesses all of the essential elements of a common-law joint stock company, which is defined to be—

“An association of persons for the purpose of business, having a capital stock divided into shares, and governed by articles of association which prescribe its objects, organization, and procedure, and the rights and liabilities of the

members, except that the articles can not release the members from their liability as partners to the creditors of the company;"

and is otherwise defined as—

"An association of individuals possessing a common capital divided into shares, of which each member possesses one or more. These shares represent the interests of the members, and are transferable by the owners without the consent of the other members or the creditors of the association." (2 Cook on Corporations, 504.)

In *Spotswood v. Morris* (12 Idaho, 360), it was held that any corporation, association, or joint stock company may be formed by individuals for the purchase of a single tract of real estate, the title to which may be taken in the trustee.

There can be no doubt that this concern is an association organized for profit and having a capital stock represented by shares. But it is earnestly insisted on behalf of these companies that the statutory requirements that a company, in order to be amenable to the tax, shall be "organized under the laws of the United States or of any State or Territory of the United States," has reference to statutory laws which prescribe specifically a method or plan of organization, and which confer franchises upon the body when organized; in other words, that the joint stock companies and associations contemplated by the act are only such as have some form of corporate existence. If this were true, then the phrase "joint stock company or association" would be surplusage, but I am not willing to give assent to such a construction.

That this company has an *organization* goes without saying. Its trustees compose a board of managers, upon whom rest the same duties as those imposed upon the board of directors of a corporation. The trustees may be discharged and their successors elected in the same way or in a way similar to that by which the directors of a corporation may be discharged and their successors elected. A change of trustees affects the business of the concern no more than the change of directors of a corporation. Trustees come and go, but the title to the property remains

with those having charge of its affairs, and its business is still conducted by them precisely the same as the business affairs of a corporation continue with it after a change of directors. The same conditions exist as to the shareholders. The shares are transferable by assignment in like manner as the shares of a corporation. Such assignment has no effect whatever on the business of the company, and the shareholders possess only the rights of drawing dividends and participating indirectly by vote in the management of the concern, the same as are enjoyed by the shareholders of a corporation. Under its organization, the period of its existence is fixed just as is that of a corporation by statute, and the death of its trustees or shareholders does not terminate or affect its existence any more than does the death of the directors or shareholders of a corporation; and in the period fixed for its existence by the articles of association, it can be dissolved only by vote of its shareholders, which power is likewise possessed by the shareholders of a corporation. It is true that its shareholders can not, by contract, free themselves from personal liability, but in *Liverpool Insurance Co. v. Massachusetts* (77 U. S. 566, 575), it was held that the fact that the shareholders of a joint stock company organized under an act of Parliament, which expressly declared that such company should not constitute a corporation, were individually liable for its debts, did not relieve it from taxation under a statute which imposed a tax upon "each fire, marine, and fire and marine insurance company *incorporated or associated* under the laws of any government or State other than one of the United States."

In short, the organization of this company is just as compact, and, in fact, is practically the same, as that of an ordinary corporation organized under a general or special statute.

Nor can it be denied that its organization is sanctioned by the laws of Massachusetts and that it obtains its vitality from those laws, just as much as a corporation organized under a special act of the legislature of that State derives its vitality from such act. Such an association, therefore, is based on the laws of Massachusetts, and, in fact, is organized thereunder.

By the expression "laws of a State," as used in statutes, reference may be had to the common law, as well as the statutory law of such State. (*Lycoming Fire Insurance Co. v. Medad Wright & Son*, 60 Vt. 515; *State v. Dyer*, 67 Vt. 690, 697.)

I am of the opinion, therefore, that these various business organizations are "joint stock companies or associations organized for profit and having a capital stock represented by shares," organized under the laws of the State of Massachusetts, within the meaning of the exise law enacted by section 38 of the act of August 5, 1909, and that they are amenable to the tax created thereby.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

ISTHMIAN CANAL COMMISSION—AWARD OF CONTRACT FOR
FURNISHING OILS.

A contract for furnishing oils to the Isthmian Canal Commission may be awarded to a bidder who either owns the oils or, at the time the agreement is made, has a valid contract to have the oils supplied; and the contract is not to be withheld because the oils are to be obtained from a company prohibited from selling to the Government providing said company has no interest in the award.

The Attorney-General declines to express an opinion upon hypothetical questions, nor will he enter into the consideration of disputed questions of evidence.

DEPARTMENT OF JUSTICE,

April 1, 1910.

SIR: I have the honor to acknowledge the receipt of your letter of the 24th ultimo, in which you refer to my communication of March 23 (*ante*, p. 231), relative to the bid of Messrs. Motley, Green & Co. for a contract to supply oil, etc.; and you point out that, under my opinion, there may be a distinction between two contingencies under either of which a question as to whether or not the bid of Messrs. Motley, Green & Co. shall be accepted may arise, and you ask whether under the second contingency which you put, you would, under my opinion, be authorized to accept

their bid. This second case you express in the following language:

"They" (Motley, Green & Co.) "may have made a contract by which they would have the right to demand the deliveries, but it may amount to only an option. In short, they may have made an agreement by which, if the government contract is awarded to them, they will have the right to demand from the Galena Oil Company the oil to supply it; but if the government contract should not be awarded to them, they would be under no obligation to take the oil."

My opinion was predicated upon the statement of facts set forth in the letter of Messrs. Motley, Green & Co. addressed to you under date of March 5, viz:

"We have a valid contract with the Galena Signal Oil Company for the supply of these oils, and are in a position to call upon them for the same at any time. They have no interest in our contract in any way whatever."

It is well settled that the Attorney-General will not express an opinion upon hypothetical questions (21 Op. 506; 22 Op. 77; 24 Op. 118; 25 Op. 94); nor will he enter into the consideration of disputed questions of evidence (17 Op. 172; 18 Op. 487; 19 Op. 672; 20 Op. 742; 22 Op. 156). Therefore, all that I can properly say is that, assuming that the representations made by Messrs. Motley, Green & Co. are correct, and that they either own the oils which they propose to sell to the Government, or that at the time of making the agreement they shall have a valid contract for the supply of the oils, the fact that they may have purchased or agreed to purchase them from one of the companies comprehended in the decree of the court adjudicating certain companies to be members of an unlawful combination and to be carrying on business in violation of law, would not require you to reject their bid.

I have the honor to be,

Very respectfully yours,

GEORGE W. WICKERSHAM.

THE SECRETARY OF WAR.

CORPORATION TAX—COLLECTION FROM ASSETS.

Corporations engaged in business after the approval of the corporation-tax law of August 5, 1909 (36 Stat. 112), but dissolved prior to December 31, 1909, are liable to the tax imposed under section 38 of that act.

Assets of a corporation are subject to a lien for the payment of taxes provided the corporation has not been dissolved and all its assets distributed prior to the time the list of assessments came into the hands of the collector.

Where the corporation is dissolved before the taxes become due, and no lien attaches to the assets of a corporation, as in the case first above referred to, the tax imposed may be collected by the Government by pursuing the assets into the hands of the stockholders, in the same manner as any other creditor might obtain satisfaction of his debt.

DEPARTMENT OF JUSTICE,

April 2, 1910.

SIR: Your letter of March 26, 1910, was received. You state therein that a corporation, which was engaged in business on August 5, 1909, and for some time thereafter, but prior to December 31, 1909, became legally dissolved in compliance with the provisions of the statutes of the State under which it was organized, contends that it is not liable for the excise tax created by section 38 of the revenue act of August 5, 1909, and you ask my opinion upon the following questions:

First. Whether or not such corporation is liable for the excise tax created by said section 38 of the act of August 5, 1909.

Second. If so liable, whether a lien exists on the assets of said corporation to secure the payment of said tax, and, incidentally, when the lien attaches to the property of a corporation, joint stock company, or association liable for taxes under said act; and

Third. If no such lien exists by what method the tax can be collected from such corporation.

In answer to these questions I will say:

1. In the first clause of section 38, act of August 5, 1909 (36 Stat. 112), it is provided "that every corporation * * * *now* or hereafter organized under the laws of the United States or of any State * * * shall be subject to pay annually a special excise tax *with respect to the carrying*

on or doing business by such corporation * * * equivalent to one per centum of the entire net income over and above five thousand dollars received by it from all sources during *such year*." That is, the tax is payable annually, and it is imposed "with respect to the carrying on or doing business by such corporation," and the amount of tax is fixed at 1 per centum upon its net income above \$5,000 received during *such year*—that is, the year during which the business is transacted with reference to which the tax is imposed. By the third paragraph it is provided that the income of the corporation shall be computed for the year ending December 31, 1909, and for each calendar year thereafter. Therefore the assessment of the tax is always for the year preceding its collection and not for the year within which the collection is made, and the present assessment is for the year 1909. It follows, therefore, that any corporation which was engaged in business after the approval of the act on August 5, 1909, is amenable to this tax.

2. It will be observed that there is no express provision in this act which creates a lien upon the property of the corporation, joint stock company, or association to secure the payment of the tax. However, by section 3186, Revised Statutes, as amended by the act of March 1, 1879 (20 Stat. 331), it is provided generally with reference to internal revenue taxes that "if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights belonging to such person;" and in the eighth paragraph of said section 38, act of August 5, 1909, it is provided that "all laws relating to the collection, remission, and refund of internal-revenue taxes, so far as applicable to and not inconsistent with the provisions of this section, are hereby extended and made applicable to the tax imposed by this section." The method of assessing the tax and collecting the same, as provided for in the act itself and in the general statutes, appears to be as follows: On or before March 1 of each year returns are required to be made by the corporations, joint

stock companies, and associations liable for the tax to the collector of internal revenue of the district in which they have their principal places of business. These returns are forwarded by the collector to the Commissioner of Internal Revenue, who shall make the assessments thereon. By section 3183, Revised Statutes, the duty of collecting all taxes in their respective districts is imposed by law on the collectors or their deputies, and by section 3184 it is provided that the collector shall in person, or by deputy, within ten days after receiving any *list* of taxes from the Commissioner of Internal Revenue, give notice to each person liable to pay any taxes stated therein, specifying the manner in which such notice shall be given. And in the fifth paragraph of section 38 of the act of 1909 it is provided that assessments shall be made, and the several companies liable to the tax shall be notified of the amount for which they are liable on or before the 1st day of June of each successive year. Therefore it is the duty of the Commissioner of Internal Revenue to send to each collector a list of the companies liable for the tax in his district, showing the amounts for which they are liable, within such time that the collector may give the required notice to such companies on or before the 1st day of June, and upon such lists the collections are made. These are the only lists which by statute are required to be sent to the collectors; and under the provision of section 3186, Revised Statutes, as amended, which is above quoted, the lien is fixed upon the assets of the corporation when this list comes into the collector's hands. Therefore if the corporation in question had distributed all of its assets and had become dissolved in the manner provided for by law prior to December 31, 1909, then when the list of assessments came into the hands of the collector there was neither corporation nor assets, and nothing upon which the lien could attach, and consequently no lien exists to secure the payment of the taxes.

3. Notwithstanding the fact that the particular method of collecting this excise tax is prescribed in the statute, yet such remedy is not exclusive, and the Government may resort to the common-law method of collecting the same. Such was the holding of the Supreme Court of the United

States in *Dollar Savings Bank v. United States* (19 Wall. 227, 240), with reference to the collection of a tax under an act which levied a tax of 5 per cent. on all dividends in scrip or money declared due to stockholders, policy holders, or depositors as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any insurance company. The dissolution of a corporation does not extinguish its liabilities; and through courts of equity creditors may pursue its assets into the hands of any person who is not a bona fide purchaser. (*Mumma v. Potomac Company*, 8 Pet. 281, 286; *Curran v. Arkansas*, 15 Howard 304, 307; *Railroad Company v. Howard*, 7 Wall. 392, 410; *Scammon v. Kimball*, 92 U. S. 362, 367.)

In *Railroad Company v. Howard* the court said:

“Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and as such they are subject to the same liabilities and restrictions as the things sold were before the sale, and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company and the division of the proceeds of the sale among the stockholders will not defeat the trust nor impair the remedy of the creditors, if any debts remain unpaid, as the creditors in that event may pursue the consideration of the sale in the hands of the respective stockholders, and compel each one, to the extent of the fund, to contribute *pro rata* toward the payment of their debts out of the moneys so received and in their hands.”

If the corporation in question engaged in business after the approval of the act of August 5, 1909, then it was liable for the tax, though it may not have become due until after the corporation was dissolved; and the Government may collect the tax by pursuing the assets of the corporation into the hands of the stockholders, in the same manner as that by which any other creditor might obtain satisfaction of his debt.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

PORTO RICO—LEGALITY OF BOND ISSUE.

The issuance of bonds by the insular government of Porto Rico for the purpose of constructing roads and bridges, as provided by an act of the legislative assembly of Porto Rico, approved March 10, 1910, not being in excess of 7 per cent of the aggregate tax valuation of its property, is legal.

DEPARTMENT OF JUSTICE,

April 15, 1910.

SIR: I have the honor to acknowledge the receipt of your letter of April 1, instant, inclosing copy of an act of the legislative assembly of Porto Rico, approved March 10, 1910, authorizing the government of Porto Rico to issue bonds for the purpose of constructing roads and bridges, and requesting an opinion as to the legality of this issue and as to the form of the bond.

By the act of Congress, "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," approved April 12, 1900 (31 Stat. 77), it was provided, section 32:

"That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, etc., etc."

And in section 38 it was enacted:

"taxes and assessments on property, and license fees for franchises, privileges, and concessions may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by act of the legislative assembly; and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law to provide for expenditures authorized by law, and to protect the public credit,
* * * *Provided, however,* That no public indebtedness of Porto Rico or of any municipality thereof shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property."

By an act of the legislative assembly of Porto Rico, "An act to authorize the issuance by the Insular Government of Porto Rico of bonds to the amount of one million dollars, and for other purposes," approved March 8, 1906

(Act, Second Session of Legislative Assembly, 170), it was provided:

"That for the purpose of constructing insular roads included in the general system as hereinafter set forth, the treasurer of Porto Rico is hereby authorized, empowered and directed to issue bonds of the people of Porto Rico to the amount of one million dollars."

By section 10 of this act the general plan of roads, including necessary bridges, was established.

By a further act of the legislative assembly, approved March 10, 1910, "An act to authorize the issuance by the Insular Government of Porto Rico of bonds to the amount of four hundred and twenty-five thousand dollars, and for other purposes," it was enacted, section 1:

"That for the purpose of constructing such roads and bridges, included in the general plan of roads contained in section 10 of an act entitled 'An act to authorize the issuance by the Insular Government of Porto Rico of bonds to the amount of one million dollars, and for other purposes' approved March 8, 1906, or of any other road authorized by law prior to the present legislative assembly of Porto Rico, including necessary bridges, as may be determined by a commission as hereinafter provided, the treasurer of Porto Rico is hereby authorized, empowered and directed to issue bonds of the people of Porto Rico to the amount of four hundred and twenty-five thousand (\$425,000) dollars, United States gold."

The issue of bonds provided for in this act was in addition to the one million dollars in the former act. Both issues were upon the same terms as to levy of tax for payment of principal and interest, exemption from payment of taxes, prohibition for sale at less than par, and devotion of the proceeds to the construction of roads and bridges.

That Congress may delegate legislative authority to the legislative assembly of Porto Rico is "a proposition not now open to discussion." (*Downes v. Bidwell*, 182 U. S. 244; *United States v. Heinszen*, 206 U. S. 370.)

In enacting these laws the legislative assembly was well within its powers. The only limitation imposed by Congress upon its authority to incur indebtedness is the provision:

"That no public indebtedness of Porto Rico or any municipality shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property."

Now, it appears that the public indebtedness of the insular government of Porto Rico is at present less than \$4,000,000. The assessed valuation of its property is \$121,866,149. The amount of indebtedness, including these two issues of bonds—\$1,000,000 and \$425,000—will be much less than 7 per cent on the aggregate tax valuation of the property of the government.

I am of the opinion that the issue of bonds as provided for in this act is legal and within the authority of the legislative assembly of Porto Rico.

The bond, a draft of which you inclose, seems to me to be in suitable form.

Very respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF WAR.

PANAMA CANAL—PURCHASE OF MATERIAL AND EQUIPMENT FROM UNLAWFUL TRUSTS.

A contract for the purchase of material and equipment for use in the construction of the Panama Canal which, by a joint resolution passed June 25, 1906 (34 Stat. 835), and an executive order of January 6, 1908, is required to be awarded to the lowest responsible bidder, can not be ignored simply because such bidder has been adjudicated to be a party to an unlawful trust or monopoly.

The contracts of a party to an unlawful trust or monopoly for the sale and delivery of merchandise are enforceable under the law, and this is the test of a responsible bidder under the provisions above referred to.

DEPARTMENT OF JUSTICE,

April 19, 1910.

SIR: I am in receipt of your favor of the 5th instant, in which you advise me that on May 26, 1909, you issued a circular providing that—

"no contract on behalf of the Government be entered into directly with any corporation which has been adjudicated to be a party to an unlawful trust and monopoly, and to be

carrying on business in violation of law, nor with any middleman or agent of any such company or concern where it is known that such middleman or agent is acting for such unlawful concern;”

that on December 11, 1909, you issued another circular of similar character, referring to the Standard Oil Company of New Jersey, and other companies; and that on February 9, 1910, you issued a circular stating that, in accordance with a holding by the Attorney-General, the previous orders should not be construed so as to forbid the purchase of goods, made by such persons or corporations adjudicated to be parties to an unlawful trust, from those who, *bona fide* and in their own right, have acquired the title to the same, and who are not middlemen or agents of such persons or corporations; and that all officers or agents of the Government in or under the War Department should be governed accordingly.

You further advise me that on June 25, 1906, Congress passed a joint resolution (34 Stat. 835), in the following language:

“That purchases of material and equipment for use in the construction of the Panama Canal shall be restricted to articles of domestic production and manufacture, from the lowest responsible bidder, unless the President shall, in any case, deem the bids or tenders therefor to be extortionate or unreasonable;”

and further, that on January 6, 1908, President Roosevelt issued an executive order applying to the Isthmian Canal Commission, and containing the following provision:

“Contracts for the purchase of supplies involving an estimated expenditure exceeding \$10,000 shall be made only after due public advertisement in newspapers of general circulation, and shall be awarded to the lowest responsible bidder, except in case of emergency, when, with the approval of the Secretary of War, advertising may be dispensed with * * *.”

You point out that this joint resolution and the executive order require contracts for the purchase of supplies for the Panama Canal to be made only with the lowest responsible bidder after public advertisement, except when the President shall deem the bids or tenders to be extor-

tionate or unreasonable, or in case of emergency. You refer to the act of June 30, 1902 (32 Stat. 514), which provides for letting contracts, and makes an exception in cases where it is deemed to the interests of the Government to do so, and advise me that until a few days ago you did not have in mind the difference between the provisions of the act referred to and of the joint resolution and executive order, but assumed that the circular issued by you would apply to purchases of material and equipment for use in the construction of the Panama Canal; and you therefore ask my opinion as to whether or not tenders for the sale of material and equipment to the Government for use in the construction of the Panama Canal, made by persons or corporations which have been adjudicated to be parties to an unlawful trust and monopoly and to be carrying on business in violation of law, can be lawfully ignored.

The whole question involved in this inquiry is, therefore, whether or not a person or corporation who offers to sell to the Government, pursuant to public invitation to bid, material and equipment for use in the construction of the Panama Canal, and who is otherwise responsible and able to carry out his contract, may be deemed to be not a "responsible bidder" because he is a party to an unlawful trust or monopoly, or otherwise carrying on his business in violation of the Sherman Antitrust Law.

The responsibility of a bidder in this aspect would seem to depend upon whether or not his contracts for the sale and delivery of merchandise are enforceable under the law. In the case of *Connolly v. Union Sewer Pipe Company* (184 U. S. 540) this question was squarely raised. The pipe company sued Connolly upon promissory notes given in Illinois on account of the purchase by the defendant from that company of certain sewer pipe. The defendant disputed his liability on the ground that at the time of the purchase of the goods the company was in a combination in restraint of trade, such as was forbidden by the common law and was contrary to the antitrust act. With respect to the defense based on the common law, the court said (p. 545):

"The defense can not be maintained. Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would

not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies, or either of them. It could pass a title by sale to anyone desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of Akron pipe."

With respect to the defense based upon the antitrust act, the court said (p. 550):

"Much of what has just been said in reference to the first special defense, based on the common law, is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or its agents, of property it acquired or which came into its possession for the purpose of being sold—such property not being at the time in the course of transportation from one State to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restricted or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is

not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

This decision furnishes a complete answer to your inquiry, unless its effect be modified by the later decision of the Supreme Court in the case of *Continental Wall Paper Company v. Voight & Sons Company* (212 U. S. 227). This latter case was decided upon a demurrer to a defense set up in the answer to the petition of plaintiff in a suit brought by the wall-paper company to recover a balance of some \$50,000 due on account for wall paper sold and delivered to the defendants. The defense averred that the plaintiff was a member of an illegal combination among manufacturers of wall paper, formed for the purpose of enhancing prices, stifling competition, and restricting the freedom of commerce between the States and with foreign nations, contrary to the common law and the Sherman Act; that the companies entering into the conspiracy effected the combination, which was to be carried out by jobbers and dealers signing agreements to buy their entire stock from the combination and at prices fixed according to the class in which such purchaser was arbitrarily placed; and that the defendants were compelled to become parties to the illegal combination by signing such contracts, and that the contract upon which the suit depended for price and terms of sale constituted one of the agreements going to make up the illegal combination represented by the wall-paper company. This defense was sustained by a majority of the court, who held that the combination was illegal and that the plaintiff could not have judgment for the amount of the account sued upon, because such judgment would, in effect, aid in the execution of the agreements which constituted the illegal combination. The court said (pp. 261, 262, 266):

"* * * The Continental Wall Paper Company seeks, in legal effect, the aid of a court to enforce a contract for the sale and purchase of goods which *it is admitted by the demurrer was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme.* We state the matter in this way, because

the plaintiff by its demurrer admits for the purposes of this case the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with the effect of both restraining and monopolizing trade and commerce among the several States.

* * * * *

“* * * Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the States and asks a judgment that will give effect, so far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment can not be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay.

“In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans and was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law.

* * * The adjudged cases all hold that upon the question whether the particular contract sought to be enforced arises out of an illegal transaction, the court will not be restricted to a partial statement of the facts but will consider all the circumstances connected with the transaction so as to ascertain its real nature.”

Mr. Justice Harlan in delivering the majority opinion distinguished that case from the case of *Connolly v. Union Sewer Pipe Company* as follows (*supra*, p. 260):

"The present case is plainly distinguishable from the Connolly case. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. *His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, nor part of nor in execution of any general plan or scheme that the law condemned.* The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. *It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them.* In short, the defense in the *Connolly* case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason *alone* of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained either upon the principles of the common law or under the antitrust act of Congress.

It is true that Mr. Justice Holmes dissented from the judgment upon the ground that the case was controlled by *Connolly v. Union Sewer Pipe Company*, and that this decision in effect reversed that case; but the majority of the court thought otherwise, and the distinction seems to be clearly drawn, and, in effect, to establish that a court will not enforce a contract for the sale of goods when such contract is part of an arrangement by which a combination in restraint of trade is effected, and where the enforcement of the contract would be, in effect, lending the aid of the court to the carrying out of the unlawful scheme or combination; but that the mere fact that a vendor is carrying on business in violation of the antitrust act will not operate

as a defense to one who deals with it by buying goods or otherwise, nor protect him from the enforcement of his contracts with such vendor. On the other hand, it would seem equally clear that the mere fact that a vendor of goods is a party to an unlawful trust or combination in restraint of trade would not protect him from an action to enforce a contract to sell and deliver goods.

For these reasons, I am of the opinion that you can not ignore the requirement of the joint resolution and executive order above referred to, to award the contract for the purchase of material and equipment for use in the construction of the Panama Canal to the lowest responsible bidder, simply because such bidder has been adjudicated to be a party to a combination in restraint of trade in violation of the Sherman Antitrust Act.

Respectfully yours,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

COMPENSATION—DISEASE CONTRACTED IN COURSE OF
EMPLOYMENT BY UNITED STATES.

An artisan or laborer employed by the United States in the construction of river and harbor work, who contracted a severe cold in the course of his employment resulting in pneumonia and which incapacitated him for duty for a period lasting more than fifteen days, is not entitled to compensation under the act of May 30, 1908 (35 Stat. 556).

The word "injury," as used in above statute, is in no sense suggestive of disease, nor has it ordinarily any such significance.

Opinion of May 17, 1909 (27 Op. 346), reviewed.

DEPARTMENT OF JUSTICE,

April 25, 1910.

SIR: I beg to acknowledge the receipt of your letter of the 18th instant, as follows:

"Application for compensation has been made under the act of May 30, 1908 (35 Stat. 556), by Mr. John Sheeran, an artisan or laborer employed by the United States in the construction of river and harbor work. Immediately prior to becoming incapacitated, Mr. Sheeran was em-

ployed at St. Marys Falls Canal, Sault Ste. Marie, Mich., in cleaning a building, attending to the heating plant, and removing ashes. In the course of his employment, while removing ashes from the furnace room to a pile outside the building, he contracted a severe cold, which resulted in pneumonia, and was incapacitated for duty for a period lasting more than fifteen days. Mr. Sheeran's disability was in no way due to negligence or misconduct on his part.

"Inasmuch as this is the first claim squarely presenting the question whether the word 'injury,' as used in the statute, is broad enough to include diseases contracted in the course of employment, and directly attributable to conditions of employment, or whether it should be limited to include only such cases of incapacity as may result from some wound or hurt received in the course of employment, I have the honor to request your opinion as to whether Mr. Sheeran is entitled to the benefits of the act."

The act of May 30, 1908 (35 Stat. 556), is entitled "An act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment." The applicable provisions of the act are set forth in the opinion rendered you on May 17, 1909 (27 Op. 346), and therefore need not be repeated here.

There is nothing either in the language of the act or its legislative history which justifies the view that the statute was intended to cover disease contracted in the course of employment, although directly attributable to the conditions thereof. On the contrary, it appears that the statute was intended to apply to injuries of an accidental nature resulting from employment in hazardous occupations—not to the effects of disease. Thus, the report of the Judiciary Committee of the House accompanying this bill states (House Rep. No. 1669, 60th Cong., 1st sess.):

"The purpose of this bill is to compensate government employees engaged in hazardous occupations. Such employment is practically confined to arsenals, navy-yards, manufacturing establishments (such as armories, clothing depots, shipyards, proving grounds, powder factories, etc.), to construction of river and harbor work, and

to work upon the Isthmian Canal. The bill provides that the wages of such an employee who is injured in the course of such employment, without contributory negligence or misconduct, shall be continued for one year unless he is sooner able to resume work.

* * * * *

“The principle of this measure is not new to our Government. For five years railway postal clerks have been thus compensated, and since May 4, 1882, members of the Life-Saving Service have enjoyed similar benefits.

* * * * *

“There is insufficient data as to the number and character of accidents occurring to government employees upon which to base an accurate estimate of the cost under this bill. In the Railway Mail Service there are 14,347 postal clerks, and last year it cost the Government \$98,143.95 because of accidents. The Life-Saving Service employs 1,898 surfmen, and the Government during the last year paid for accidents and deaths \$41,270.51. *This amount also includes sums paid for sickness contracted in the service.*

“There are approximately 6,600 artisans and laborers employed in arsenals, armories, and other manufacturing establishments of the War Department, and during the past ten years 8 were killed and 41 more or less seriously injured. The average absence from work because of these injuries was about two and one-half months. Under this bill the Government would have paid during the ten years a total of about \$20,000, or an average of \$2,000 a year. It ought to be added that the fewness of the accidents arising in the workshops of the War Department is largely due to the excellent condition of the machinery and the discipline exercised by the officers in charge.

* * * * *

“This plan, uniformly advocated by such employees of the Government as appeared before the committee, seems to be much more satisfactory because it gives food to the family at a time when the employee can not earn wages. Indeed, a strong feeling was evidenced at the hearings that some less expensive system of compensating accidents should be adopted than the lawsuit, which involves delay,

produces uncertainty, withholds money when most needed, and works other hardships. What the injured employee seems to desire is to have his family supported while he is unable to earn wages, and he seems to prefer to take a less amount, to be used at such a time, than to wait the result of a slow lawsuit, even though it may, if he succeeds, bring him two or three times as much."

The Senate committee reporting this bill adopted the House Report (S. Rep. No. 670, 60th Cong., 1st sess.).

It will be observed that the statute relating to the Life-Saving Service expressly covers "any wound or injury received or *disease contracted*" therein. (22 Stat. 57.) The provision as to the Railway Mail Service, on the other hand, applies simply to "any railway postal clerk who shall be killed while on duty, or who, being injured while on duty, shall die within one year thereafter as a result of such injury." (32 Stat. 759; 33 Stat. 414; 34 Stat. 474, 1213; 35 Stat. 413, 667.)

In the opinion of May 17, 1909, above cited, it was held that a plate printer in the Bureau of Engraving and Printing, whose wrist was sprained in the course of his employment, which hurt was complicated by rupture of the synovial sac surrounding the ligaments leading from the back part of the forearm to the fingers, had "suffered an injury" within the meaning of the Act of May 30, 1908.

In considering the scope of the statute, attention was called to the fact that the first two sections thereof used the word "injury," while the word "accident" did not occur until the third section; and it was said (27 Op. 350):

"In other words, the statute quite consistently provides for the cases of injuries in the course of the employment and accidents resulting in death or otherwise. The word "injury" is employed comprehensively to embrace all the cases of incapacity to continue the work of employment unless the injury is due to the negligence or misconduct of the employee injured—and including all cases where as a result of the employee's occupation he, without any negligence or misconduct, becomes unable to carry on his work, and this condition continues for more than fifteen days. The word "accident" is employed to denote the happening

of some unusual event, producing death or injury which results in incapacity for work, lasting more than fifteen days. That is to say, within the language of the statute an employee may be injured in the course of his employment without having suffered a definite *accident*."

That opinion, however, was not intended to create the impression that the statute in question covered diseases contracted in the course of employment. The language of the opinion is, perhaps, broader than it should be, in the light of the committee report on the bill above quoted, which indicates that only injuries of an accidental nature were in mind. As, however, the statute is remedial, it should be generously construed, and so construed it might well be held to include injuries of the character there referred to, although, strictly speaking, no definite accident had occurred which gave rise to the injury. The word "injury," however, as used in the statute, is in no sense suggestive of disease, nor has it ordinarily any such signification.

I am therefore of the opinion that the case of Mr. Sheeran, as stated by you, is not covered by the Act of May 30, 1908.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

PHILIPPINE ISLANDS—CORPORATIONS HOLDING REAL ESTATE.

Neither a corporation formed in Belgium to acquire and possess lands in the Philippine Islands, nor any other foreign or domestic corporation authorized to engage in agriculture, may legally purchase or hold more than 1,024 hectares of land in the Philippine Islands.

DEPARTMENT OF JUSTICE,

April 29, 1910.

SIR: I have the honor to acknowledge the receipt of your communication of April 21st instant, in which you state:

"I have the honor to inclose copies of two notes addressed, respectively, to the minister of foreign affairs at Brussels by Mr. Ed. C. Andre, dated April 4, and to the

Belgian minister at this capital by the minister of foreign affairs of his Government, dated April 7, and with them three letters from Mr. Andre, dated March 30 and April 4, addressed to you and handed to me by the minister of Belgium for delivery to you. These documents raise the question whether a Belgian corporation authorized to engage in agriculture may legally purchase and hold a plantation in the Philippine Islands containing an area of 1,430 hectares. The collateral inquiry is also presented whether, if the answer to the foregoing question is in the negative, an agricultural and commercial corporation created under Philippine law may take and hold the said plantation."

You request an expression of my opinion on both of these questions.

The act of Congress entitled "An act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," approved July 1, 1902 (32 Stat. 691), is the law still in force.

By the seventy-fifth section of that act it is provided:

"That no corporation shall be authorized to conduct the business of buying and selling real estate or be permitted to hold or own real estate except such as may be reasonably necessary to enable it to carry out the purposes for which it is created, and every corporation authorized to engage in agriculture shall by its charter be restricted to the ownership and control of not to exceed one thousand and twenty-four hectares of land * * *."

The first clause of this section forbids the organization of corporations to conduct the business of buying and selling real estate. The next, recognizing the necessity of some corporations to hold real estate for the conduct of their business, denies the permission to hold or own any real estate except such as may be reasonably necessary to enable it to carry out the purposes for which the corporation is created. The holding of real estate, under this provision, is incidental to the main business of the corporation, such as manufacturing or trading. By no intendment can this apply to a corporation formed for the use or cultivation of land.

By the next clause of the section it is provided: "Every corporation authorized to engage in agriculture shall by its charter be restricted to the ownership and control of not to exceed one thousand and twenty-four hectares of land."

Mr. Andre suggests, in one of the notes transmitted through you: "I am in doubt whether this refers to the rules and by-laws of the corporation or to the privilege granted to a company at being filed."

This provision is not directory. It affects the very being of the corporation. It is an absolute prohibition of the power to hold land in excess of 1,024 hectares. This limitation was placed in the act after much debate and deliberation in the United States Congress, and it is repeated and emphasized in all the legislation upon this subject.

These prohibitions in the organic act were embraced in the "corporation law" of the Philippine Commission, enacted by authority of the United States. By Article I, section 13, it is enacted: Every corporation has power (paragraph 5):

"To purchase, hold, convey, sell, lease, let, mortgage, incumber, and otherwise deal with such real and personal property as the purposes for which the corporation was formed may permit, and the transaction of the lawful business of the corporation may reasonably and necessarily require, unless otherwise prescribed in this act: *Provided*, That no corporation shall be authorized to conduct the business of buying and selling real estate or be permitted to hold or own real estate except such as may be reasonably necessary to enable it to carry out the purposes for which it is created, and every corporation authorized to engage in agriculture shall be restricted to the ownership and control of not to exceed one thousand and twenty-four hectares of land * * *."

Reversing the order in which the questions in your communication are presented to me, and replying to the second inquiry, I think an agricultural corporation created under Philippine law can not take and hold of the plantation described, or of any other lands, more than 1,024 hectares.

By the last paragraph of this same section 75 of the act of Congress it is provided: "Corporations not organized in the Philippine Islands and doing business therein shall be bound by the provisions of this section so far as they are applicable." And by section 73 of the "Corporation law" of the Philippine Commission it is enacted:

"Any foreign corporation or corporation not formed, organized, or existing under the laws of the Philippine Islands and lawfully doing business in the islands shall be bound by all laws, rules, and regulations applicable to domestic corporations of the same class, save and except such only as provide for the creation, formation, organization, or dissolution of corporations or such as fix the relations, liabilities, responsibilities, or duties of members, stockholders, or officers of corporations to each other or to the corporation: *Provided, however,* That nothing in this section contained shall be construed or deemed to impair any rights that are secured or protected by the treaty of peace between the United States and Spain, signed at the city of Paris on December tenth, eighteen hundred and ninety-eight."

This act was passed under the authority delegated by the organic act. Its provisions are declaratory of the limitations of that act.

The restrictions upon the ownership and control of lands in the Philippine Islands by corporations are absolutely determined by this legislation. It is beyond the power of the executive branches of the Governments, either of the United States or the Philippine Islands, to authorize or permit corporations to own or hold lands in excess of the amount so designated.

I am therefore of opinion that neither a corporation formed in Belgium to acquire and possess lands in the Philippine Islands, nor any other foreign or domestic corporation authorized to engage in agriculture, may legally purchase or hold more than 1,024 hectares of land in the Philippine Islands.

I have the honor to be, sir,

Your obedient servant,

GEORGE W. WICKERSHAM.

THE SECRETARY OF STATE.

PHILIPPINE ISLANDS—TRANSFER OF LANDS RESERVED
FOR NAVAL PURPOSES TO WAR DEPARTMENT.

The President has authority to transfer the use and control of lands in the Philippine Islands, reserved by executive order for naval purposes, to the War Department for military purposes.

Opinion of November 3, 1904 (25 Op. 269), approved.

DEPARTMENT OF JUSTICE,

April 29, 1910.

SIR: I have the honor to acknowledge the receipt of your letter of the 16th instant, relative to the proposed transfer of certain reserved lands in the Philippine Islands from the control of the Department of the Navy to the control of the Department of War.

By an executive order of June 19, 1903, among other things, certain lands at Isabela de Basilan and Pollock, Mindanao, in the Philippine Islands, were set aside for "the exclusive use and control" of the naval authorities. These reservations are considered to be of no further use to the Navy and are desired for use by the Army. You request my opinion whether, "in the absence of express authority from Congress, there is any legal objection to the issuance of an executive order transferring the use and control of the undisposed of lands reserved for naval purposes by Executive Order of June 19, 1903, to the control of the War Department to be used for military purposes."

All territory belonging to the United States is subject to the disposition of Congress. Congress has the absolute and unlimited power by the Constitution to provide for its transfer in any mode it sees fit. This is so whether the lands have been acquired by treaty, or conquest, or purchase, or cession. Congress has by general laws provided for the sale or disposal of parts of the national domain in the United States. The term "public lands," in all legislation, is used to describe such lands. There are lands reserved from these, by authority of Congress, for certain purposes. They would be part of the public domain if not so reserved. They can be restored to the body of the public lands only by Congress, the power which authorized their separation.

Congress adopted a different policy in the disposition of the lands acquired from Spain by the treaty of Paris. It never incorporated those lands into the body of the public lands of the United States, subject to sale or other disposal under general laws of the United States. By section 12 of the "Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," approved July 1, 1902 (32 Stat. 691, 695), it is enacted:

"That all the property and rights which may have been acquired in the Philippine Islands by the United States under the treaty of peace with Spain, signed December tenth, eighteen hundred and ninety-eight, except such land or other property as shall be designated by the President of the United States for military and other reservations of the Government of the United States, are hereby placed under the control of the government of said islands to be administered for the benefit of the inhabitants thereof, except as provided in this act."

The lands became part of the public domain of the United States by the cession. But they were placed by Congress under the control of the Philippine Government, and that government was authorized to provide by general legislation for their disposal. (Secs. 13, 14, and 15.)

Authority was given to the President of the United States to make some exceptions out of the general grant of "control" of these lands. This authority was full and complete. There were no limitations upon the discretion of the President beyond this, that the lands and property excepted were to be designated for "military and other reservations of the Government of the United States." They were not, as in the public domain in the United States, reserved from the public lands for public uses to be afterwards restored to the condition of those public lands under general laws.

Lands being excepted under this authority from the lands placed under the control of the Philippine government, a reasonable construction of the statute would be that they could be dedicated to any necessary purposes of the Government of the United States. That they might, at one

time, have been specifically designated for the use of the military forces or of the navy forces would not deprive the President of the power to use them, if he thought proper, for some other purposes required by the United States. The power delegated to designate the lands for "military and other purposes" does not mean that a particular use should be designated for each parcel at the time it is selected or excepted, and that that designation exhausted the power of the President so that he could not afterwards devote it to some other needed use. The right of exception is to provide for the necessities of the Government of the United States in whatever form they might arise. By these provisions of the act any interference with the general control of the public lands in the Philippine Islands is avoided.

By an act of Congress approved July 1, 1902 (32 Stat. 731), the President was "authorized to make, within one year after the approval of this act, such reservation of public lands and buildings belonging to the United States in the island of Porto Rico, for military, naval, light-house, marine hospital, post-offices, custom-houses, United States courts, and other public purposes, as he may deem necessary," * * * the balance with some exceptions "not so reserved being granted to the government of Porto Rico."

Under this authority the President by proclamation reserved certain parcels of land for "naval purposes," and by another proclamation reserved certain other parcels for "divers purposes." Some of these lands being desired for the Light-House Establishment, the Secretary of the Navy issued an order transferring them to the Department of Commerce and Labor.

The opinion of my predecessor, Mr. Attorney-General Moody, was requested as to the sufficiency of the title thus acquired by this transfer. It was held in an opinion by Mr. Solicitor-General Hoyt, approved by the Attorney-General, that the transfer was allowable.

Mr. Hoyt said (25 Op. 269, 270):

"The title to all of these lands being in the United States, the effect of the proclamation was to reserve for public purposes certain lands out of the public lands in Porto Rico ceded by Spain to the United States; to assign to certain

Executive Departments of this Government the control of the lands reserved as aforesaid; and to relinquish to the government of Porto Rico such of said lands as were not so reserved.

"Where it is found that the Government work can the better be carried on by a transfer of the control of a particular parcel, it is thought that the Secretary has ample authority to make the same. The acts of the Secretaries are the acts of the President."

The circumstances of that case are similar to those in the one presented to me, and I agree with the conclusion arrived at by my predecessor.

I am of opinion that under the authority given to the President he can in the exercise of his discretion make the executive order you refer to.

Very respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE NAVY.

COPYRIGHT LAW—REGISTRATION OF TYPEWRITTEN
DOCUMENTS.

Typewritten pages fastened together and having a printed cover and title-page are subject to registration under the copyright law of March 4, 1909 (35 Stat. 1075).

The meaning of that clause in section 12 of the act of 1909, which provides that the book "shall have been produced in accordance with the manufacturing provisions of section 15 of that act," is that the book shall not have been produced in violation of that act; but the provision does not attempt to prescribe any regulation as to the form in which the book should appear. Section 15 means that if the book is printed, the printing shall be done as required therein.

DEPARTMENT OF JUSTICE,

May 2, 1910.

SIR: I have the honor to acknowledge receipt of your communication of the 26th ultimo, in which you state the following facts transmitted to you by the Librarian of Congress:

The publishers, Thomas Nelson & Sons, have sent to the Copyright Office for deposit under the copyright law, and for copyright registration, two copies of an article entitled

Nelson's Bureau of Research: A few specimens of inquiries and answers." These copies consist of 122 typewritten pages, with a printed cover and title page, said cover and pages being fastened together in the usual manner in which typewritten documents are fastened. It is explained by the applicants that they publish an encyclopedia, one of the essential features of which is that it is kept up-to-date; that in connection with the published encyclopedia the privilege is offered its subscribers of submitting letters of inquiry upon any subject whatsoever; that to such inquiries careful and elaborate answers are prepared under the supervision of eminent authorities, and these answers are typewritten and copies struck off by means of the mimeograph; that the copies produced in this way are issued for general circulation; and it is in these sheets of answers bound as stated that the publishers desire to register a claim for copyright; and you ask my opinion as to whether or not the register of copyrights has authority, under the copyright act of March 4, 1909, (35 Stat. 1075), to register the same.

The real question is, whether or not, under the copyright law, a book must be printed before a claim for copyright therein can be admitted to registration. If copies of this work were not reproduced for sale, it is conceded that the claim should be registered under section 11 of the act; but inasmuch as numerous copies are struck off for circulation, it is thought, and correctly so I think, that if copyrighted at all, it must be as a publication, and not as a mere manuscript.

By section 5 of said act it is provided:

"That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

"(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations."

* * * * *

Webster defines a book to be:

"A collection of sheets of paper or similar material, blank, written or printed, bound together; commonly,

many folded and bound sheets containing continuous printing or writing."

The courts have shown the greatest liberality in interpreting the copyright laws, and have, in favor of authors, extended the word "book" so as to make it include works which do not fall even within this broad definition. In *Clayton v. Stone & Hall* (2 Paine 382, 391) the court held that a newspaper could not be copyrighted on account of its method of publication, but in the course of its opinion the court said:

"It seems to be well settled in England, that a literary production, to be entitled to the protection of the statute on copyrights, need not be a book in the common and ordinary acceptance of the word—a volume, written or printed, made up of several sheets and bound up together. It may be printed on one sheet, as the words of a song or the music accompanying it. It is true that the English statute of 8 Anne, in the preamble, speaks of *books and other writings*; but the body of the act speaks only of books, the same as in the act of Congress; and a learned commentator upon American law (2 Kent's Com. 311) seems to think the English decisions on this subject have been given upon the body of the statute of Anne, without laying any stress upon the words *other writings* in the preamble."

See also Drone on Copyrights, 142, and 9 Cyc. 898.

Clearly, therefore, the work submitted is a book as defined both by lexicographers and the courts, and the claim for copyright therein may be registered unless there is some provision in the act which prohibits it.

By section 9 it is provided:

"That any person entitled thereto by this act may secure copyright for his work by publication thereof with the notice of copyright required by this act."

* * * *

and by section 12 it is provided:

"That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of

copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, which copies, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section fifteen of this act."

* * * * *

The copyright, therefore, is obtained by publication of the book and the giving of notice of copyright required by the act; but it is suggested that in consequence of the reference in section 12 to the manufacturing provisions in section 15, and the requirements of said section 15, the copyright can not be enforced, and may be subsequently entirely defeated, and the register of copyrights can not issue a certificate of registration in consequence of a failure to deposit in the copyright office two copies *printed* as required by said section.

Section 15, among other things, provides:

"That of the *printed* book or periodical specified in section five, subsections (a) and (b) of this act * * * the text of all copies accorded protection under this act * * * shall be printed from type set within the limits of the United States, etc."

The use of the word "printed" in connection with "book" might very well be construed as a recognition that other kinds of books are subject to copyright, but that the provision of this section, in so far as it applies to books, is restricted to *printed* books.

But, in addition to this, the purpose of section 15 should be taken into consideration in determining whether or not it has the effect of limiting the right of copyright to printed books; and the language of that section, as well as the report of the committee which had the bill in charge, clearly shows that it was inserted solely for the purpose of protecting American labor, and that it was not the design of Congress to thereby, in any respect, restrict the character of works which, under other sections of the act, might be copyrighted. In drafting the bill it was no doubt assumed that books would, ordinarily and probably universally, be printed for circulation; and the purpose was

to require all the *printing* of books protected under the act to be done as described in said section 15, but it was certainly not intended to prescribe any regulation as to the form in which the book should appear. That is, in the passage of sections 15 and 16, Congress was concerned in where and by whom the work of preparing the books for circulation and sale should be done, and not in the particular method by which the author should impart his ideas to the public. A contrary holding might lead to great uncertainty and confusion. It has been universally held that there is no requirement as to the number of pages on which a work shall appear in order that it may be entitled to the benefit of copyright. If it appear on one or even four pages, then there can be no necessity for a binding; and yet section 15 provides that "the printing of the text and the *binding* of the said book shall be performed within the limits of the United States," thus implying, if the strict construction suggested be adopted, that the book must not only be printed, but must also be bound before the claim for copyright in the same can be registered. Of course Congress did not intend to, and did not, introduce such a radical innovation into the copyright law. The meaning of that clause in section 12 which provides that the book "shall have been produced in accordance with the manufacturing provisions of section 15 of this act," is that the book shall not have been produced *in violation* of that section; and section 15 means that if the book is printed, the printing shall be done as required therein.

I am of the opinion, therefore, that the claim to copyright in the work in question should be registered.

Respectfully,

J. A. FOWLER,
Assistant Attorney-General.

Approved:

GEORGE W. WICKERSHAM.

The PRESIDENT.

**PRESIDENT—POWER TO DETAIL OFFICERS OF THE
ENGINEER CORPS.**

The President has the power to detail officers of the Engineer Corps of the Army to act as experts at a hearing involving the granting of a permit to the city and county of San Francisco, to use the Hetch Hetchy Valley, in the Yosemite National Park, for maintaining a water supply for municipal purposes.

Officers of the Engineer Corps of the Army may be ordered to any duty in the line of their profession.

Section 9 of the Act of March 4, 1909 (35 Stat. 1027) does not operate to either repeal any portion of section 1158 Revised Statutes, or to revoke the implied power there given to the President, to order Army engineers to any duty, nor does it curtail his power under that section, or otherwise, to assign such engineers to any duty.

DEPARTMENT OF JUSTICE,
May 5, 1910.

SIR: In your note of April 23, 1910, to which I have the honor to respond, you state that—

“The Secretary of the Interior has requested the detail of several officers of the Engineer Corps of the Army to consider, from an expert standpoint, certain questions that will arise in a hearing under the order to show cause in the matter of the Hetch Hetchy Valley permit, which is to take place on the 18th of May proximo. It is understood that any findings that may be reached by such board are of an advisory character and are for the information of the President and the Secretary of the Interior.”

You refer me to section 9 of the act of March 4, 1909 (35 Stat. 945, 1027), and to section 1158, Revised Statutes, and ask my opinion “whether the operation of the enactment last above cited takes the case out of the operation of the act of March 4, 1909, and to give the authority of law to the proposed employment of any engineer officers who may be detailed by the President in the operation of section 1158 of the Revised Statutes.”

On May 11, 1908, the former Secretary of the Interior granted to the city and county of San Francisco, Cal., a permit to use what is known as the Hetch Hetchy Valley, in the Yosemite National Park, for the purpose of maintaining a water supply for municipal and other purposes.

Upon the coming in of numerous complaints and objections to this use of a portion of the national park the present Secretary of the Interior suspended the permission thus given, and on February 25, 1910, made an order in substance that said city and county of San Francisco show cause why said permit to thus use the Hetch Hetchy Valley should not be vacated. It is this hearing, which is to take place on the 18th proximo, to which the Secretary of the Interior refers, and at which he desires the attendance, as experts, of these engineer officers.

That the presence of these officers at this hearing, and their opinions as experts, would be of much use and assistance to the Secretary in passing upon the matters before him, and therefore desirable, is obvious, if such detail can lawfully be made in view of the statutory provisions referred to.

Section 1158, Revised Statutes, is from the act of April 10, 1806, and is as follows:

“Engineers shall not assume nor be ordered on any duty beyond the line of their immediate profession, except by the special order of the President. They may, at the discretion of the President, be transferred from one corps to another, regard being paid to rank.”

Section 9 of the act of March 4, 1909 (35 Stat. 945, 1027), provides:

“Hereafter no part of the public moneys, or of any appropriation heretofore or hereafter made by Congress, shall be used for the payment of compensation or expenses of any commission, council, board, or other similar body, or any members thereof, or for expenses in connection with any work or the result of any work or action of any commission, council, board, or other similar body, unless the creation of the same shall be or shall have been authorized by law; nor shall there be employed by detail, hereafter or heretofore made, or otherwise personal services from any executive department or other government establishment in connection with any such commission, council, board, or other similar body.”

I am of opinion that unless prohibited by the provisions last quoted the President, under section 1158 above, and

as Commander in Chief of the Army and Navy, and as the executive head of the nation, would have the power to order the detail of these officers for the purposes stated.

The provision in this section that "engineers shall not assume nor be ordered on duty beyond the line of their immediate profession, except by special order of the President," affords the clearest implication that this may be done by such order, *a fortiori* may such order be made as to a duty within the line of their profession.

At this day the Engineer Corps is a component part of the Army and its members are much more subject to military command and regulations than were engineers serving with the army in 1806 when this provision was enacted, and I can not doubt that under present conditions the President might, even without any special authority, order any portion of that corps to any duty not inconsistent with their profession as engineers, unless prohibited by the other provision above cited.

The particular question is, therefore, not whether the President would ordinarily have power to make the detail in question here, but whether the section of the act of 1909 above quoted, has prohibited its exercise.

It will be observed that the earlier act of 1806 is a special act relating to engineers only, and has but two purposes—the forbidding of the assumption by, or the ordering engineers to a duty beyond the line of their immediate profession, and the giving to the President power to transfer them from one corps to another.

As there is no apparent reason therefor, we can not readily impute to Congress an intention to repeal either of these provisions which have existed for more than a century, and as there is no express repeal of either, they are still in force unless repealed by implication from the later provision. Such repeals are not favored and are never held to take place when by any reasonable construction it is possible that both may stand together.

As is said in Endlich, Int. Stat. section 223—

"It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute, to say that a general act

is to be construed as not repealing a particular one, that is, one directed towards a *special object* or a *special class* of objects (a). * * * It is usually presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special act, or, what is the same thing, by a local custom (e). Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language (a), or there be something which shows that the attention of the legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous one (b); or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one, * * *."

In *United States v. Nix* (189 U. S. 199) it is said, page 205:

"The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject * * *."

That is, while a repugnancy may be sufficient for the repeal of a general act, it is not sufficient in case of a special act, but besides and beyond this there must be an intention, and one manifested by something other than the repugnancy to repeal the earlier special act.

Then, too, there is in every statute an implied exception to the generality of its language, whenever called for in order to avoid unconstitutionality, conflict with other laws, or absurd or unreasonable consequences, and it would seem that this is one of the very many instances where such exception is called for.

That there must be at least one exception to or modification of the general language used in the latter portion of what is quoted above from the act of 1909 is certain. From the language used it will be seen that even though

this "commission, council, board, or other similar body" may have been created and authorized by law as there stated, yet unless the act which does this, makes the detail, no detail or service of even the members of such board, its officers, witnesses, experts or council, can be made "from any executive department or other government establishment" to effect the purpose of such board. The section does not say "from any executive department other than the one in, or for which, such board is created," which was doubtless the intention, but it says flatly that no detail shall be made or personal services furnished by any executive department or any government establishment whatsoever.

It is manifest that at least one exception must be made to the general language used to prevent the provision from defeating its own purpose, and if this, then why not one which will avoid a conflict with a very much older act; and a question of unconstitutionality arising, as will be seen later, from what would purport to be a curtailment of the constitutional powers of the President.

Still another settled rule requires us to avoid, if possible, a construction which would bring the later act in conflict with an earlier existing statute where no intention to repeal or modify the earlier act is expressed.

And when we consider that the first part of this section 1158—that portion here considered—does not confer any power, but on the contrary forbids its use unless ordered by the President, it would seem clear that this restraint was not intended to be removed by the later act, and if not, then it would seem equally certain that the implied grant of power to do, by special order, what is otherwise forbidden, was not intended to be repealed.

There is another reason why the earlier section should not be considered as repealed, nor the power of the President curtailed by the later act referred to. By the Constitution the President is the Commander in Chief of the Army and Navy of the United States.

Except what is implied in the title itself there is no attempt to enumerate or define the powers of the President as Commander in Chief, and yet it is certain that even in the

absence of this he was, by the Constitution, clothed with very many and important powers, and equally certain that it is not within the competency of Congress to divest him of or curtail any power which the Constitution has given him. It would seem certain also that whatever power was at that time inherent, or generally considered as inherent in, or belonging to the office of commander in chief of the armies and navy of a nation, was by this provision conferred upon the President, as far as applicable to this country. If this were not so, it would be difficult to say that the President, as Commander in Chief, has any particular power by virtue of this constitutional provision.

We need not here trace history back in order to ascertain what powers were at the date of our Constitution inherent in the Commander in Chief. As the title implies, he had at least the power to command the Army and Navy of the United States, and as he was Commander in Chief he had no superior in that command, nor could Congress deprive him of or curtail that power.

In *McBlair v. United States* (19 Ct. Cl. 528), it is said, page 541—

“While the President is made Commander in Chief by the Constitution, Congress have the right to legislate for the Army, not impairing his efficiency as such Commander in Chief, and when a law is passed for the regulation of the Army, having that constitutional qualification, he becomes as to that law an executive officer and is limited in the discharge of his duty by the statute.”

And in *Swaim v. United States* (28 Ct. Cl. 173), it is said, page 221—

“ * * * there remains the significant fact in our military system that the President is always the Commander in Chief. Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have a military force Congress can not take away from the President the supreme command. It is true that the Constitution has conferred upon Congress the exclusive power ‘to make rules for the government and regulation of the land and naval forces;’ but the two powers are distinct; neither can trench upon the other; the President

can not, under the disguise of military orders, evade the legislative regulations by which he in common with the Army must be governed, and Congress can not in the disguise of 'rules for the government' of the army impair the authority of the President as Commander in Chief."

This power or right of command extends as much to one portion of the Army as to any other, and includes the assignment of any portion thereof to such duty as the Commander in Chief deems best.

Under the laws and Army regulations of the present time the Engineer Corps is just as much an integral portion of the Army as is any other, and its members are just as much subject to military command and to assignment to any duty consistent with their profession as are other officers. And this would be equally so even without this section 1158 or any other special authority.

But it is unnecessary for the present purpose to express any opinion as to the competency of Congress to curtail or restrict this power of command vested in the President as commander in chief. It suffices to say that it does not appear that Congress has attempted or intended to do so, or to repeal any portion of section 1158, Revised Statutes, or its implied grant of power to the President to order army engineers to any duty.

To attempt to curtail or restrict this power of command which the Constitution has vested in the President would be a serious and delicate matter, and in view of the considerations referred to it is quite safe to say that Congress would not do this in a general appropriation act by a general provision applicable alike to all departments, with no expression of any intention to thus curtail the power of the Commander in Chief of the Army, or any reference to that subject, and with no repeal of such a provision as is that of section 1158, Revised Statutes.

Under this section Army engineers may, by special order of the President, be assigned to any duty not actually incompatible with their profession or office. This is the clear and certain implication of that section. And what is implied in a statute is just as much a part of the act as if it were expressed in the same words. *United States v. Bab-*

bit (1 Black, 55). As this is a special act making special provision for the assignment of army engineers to duty, it would seem that by familiar rules of construction it is not repealed by such a later general act, even though the terms of the latter are broad enough for that purpose.

The question here considered is a peculiar one in that it involves a question of the power of the President as Commander in Chief, and what is here said would not be applicable to cases not involving this question.

I am of opinion that section 9 of the act of March 4, 1909, does not operate to either repeal any portion of section 1158, Revised Statutes, or revoke the implied power there given to the President to order Army engineers to any duty, or to curtail his power under that section or otherwise to assign such engineers to any duty, and that he may, by special order, make the detail of engineers requested in this case.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

TONNAGE TAX—COASTING AND FOREIGN TRADE, GREAT LAKES.

The steamer *H. S. Holden*, enrolled and licensed under section 4318 of Revised Statutes for the coasting or foreign trade, which cleared Cleveland, Ohio, for Two Harbors, Mich., without cargo or passengers from Cleveland to Two Harbors, but with cargo from Cleveland to the intermediate port of Fort William, Canada, which cargo she discharged at the latter place, and then proceeded to Two Harbors, is within the provisions of section 2793 of the Revised Statutes, and is not amenable to the tonnage tax imposed by section 36 of the act of August 5, 1909 (36 Stat. 111).

DEPARTMENT OF JUSTICE,

May 6, 1910.

SIR: I have the honor to reply to your letter of November 13, 1909, transmitting a copy of an application by the owner of the steamer *H. S. Holden* for refund of tonnage tax collected on October 11, 1909, under section 36 of the tariff act of August 5, 1909 (36 Stat. 111), in circumstances

detailed in the question which you submit for opinion, as follows:

"Was the steamer *H. S. Holden* enrolled and licensed to be employed either in the coasting or foreign trade, as provided in section 4318 of the Revised Statutes, on a voyage from Cleveland to Two Harbors, Mich., but without cargo or passengers for Two Harbors, carrying coal, however, from Cleveland to the intermediate port of Fort William, Canada, and after there discharging her cargo, proceeding thence to Two Harbors, to be regarded under section 2793 of the Revised Statutes as an enrolled and licensed vessel engaged in the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States, arriving at a port in one district from a port in another district, and also touching at an intermediate foreign port?"

Section 2793 of the Revised Statutes, under which your question arises, reads:

"Enrolled or licensed vessels engaged in the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States, departing from or arriving at a port in one district to or from a port in another district, and also touching at intermediate foreign ports, shall not thereby become liable to the payment of entry and clearance fees, or tonnage tax, as if from or to foreign ports; but such vessels shall, notwithstanding, be required to enter and clear."

At the outset it must be inquired whether this section 2793 is still in force; but on that I can have no doubt. The tariff act of August 5, 1909, certainly does not repeal the section; because section 36 of that act, dealing with the subject of tonnage duties, expressly declares that it "shall not be construed to amend or repeal * * * section twenty-seven hundred and ninety-three of the Revised Statutes". Any claim of repeal must therefore be that section 2793 was extinguished by some one of the enactments which, intermediately between the Revised Statutes and the tariff act of 1909, restated or altered the general system of tonnage duties. These intermediate acts were approved February 27, 1877 (19 Stat. 250); June 26, 1884

(23 Stat. 53, 57); and June 19, 1886 (24 Stat. 79, 81). All these statutes were in substance as well as in form alterations of or substitutes for section 4219 of the Revised Statutes; and they can have had no more purpose of repealing section 2793 of the Revised Statutes than could be ascribed to the last-mentioned section itself. It is of course beyond cavil that neither of the two stated sections of the Revised Statutes was designed to repeal the other. Their simultaneous inclusion in the revision forbids any such idea. Further, section 2793 of the Revised Statutes was a revision of section 2 of the act of February 10, 1871, and section 4219 of the Revised Statutes was an outgrowth of numerous acts antedating 1871. In their origin, therefore, section 2793 of the revision was subsequent to section 4219; and that fact, beside the nature of section 2793, shows that it was intended as a special exception from the general scheme of tonnage duties. In all the years between the revision of 1874 and the tariff act of 1909, section 2793 of the Revised Statutes has been continuously and consistently recognized and enforced by the executive officers of the Government, notwithstanding the intermediate alterations of the general tonnage duties; and, as already seen, the tariff act of 1909 itself in express terms contains a legislative recognition of section 2793 as still operative.

How, then, does section 2793 of the Revised Statutes apply to the facts stated in your question? Does it cover such a case? The steamer *Holden* was admittedly enrolled and licensed under section 4318 of the Revised Statutes, which says that vessels of the United States "navigating the waters on the northern, northeastern, and northwestern frontiers, otherwise than by sea," when so enrolled and licensed, may "be employed either in the coasting or foreign trade on such frontiers." This statutory provision accords to the described class of vessels the peculiar privilege of engaging in foreign trade without the registration generally required by the statutes for that purpose, while still engaging under their enrollment in the coasting trade. The *Holden* likewise was, within section 2793, departing from a port in one district to a port in another district, viz, from Cleveland, Ohio, to Two Harbors, Mich. The remain-

ing inquiries under the statute are whether the fact that the *Holden* carried no cargo or passengers from Cleveland to Two Harbors prevented her being "engaged in the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States," and whether the fact that she carried cargo from Cleveland to Fort William, Canada, shows that she was doing something more than "touching at an intermediate foreign port." It will be more convenient to make the latter inquiry first.

1. Does section 2793 contemplate that the intermediate foreign port be touched merely for a purpose less than or different from discharge or receipt of cargo at that port? On the contrary, it seems clear that the section covers stoppage at the foreign port for receipt or discharge of cargo, and not improbably it looks chiefly to that case. The purposes for which the foreign port may be touched are not prescribed or limited in the act. The language is wide and general. In all ordinary circumstances there would be no motive whatever for going into the foreign port except the delivery or procurement of cargo. The conditions of the trade on the frontier waters between the United States and Canada involve a close and necessary intermixture of domestic and foreign carrying. The existence and the expediency of that intermixture are recognized, as we have seen, by section 4318 of the revision in its peculiar allowance that vessels may carry on both kinds of trade under enrollment alone. Further, this section 2793 is a revision of section 2 of the act of February 10, 1871 (16 Stat. 595); and that section supplements and qualifies the act of July 1, 1870 (16 Stat. 176), the first section of which in terms refers to touching at a port for the purpose of taking on or putting off cargo. Still further, section 2793 itself, by its reference to vessels "engaged in the foreign and coasting trade," certainly shows that a vessel enjoying its benefits may be—even if it need not be—carrying both domestic and foreign cargo on the same voyage, and therefore that the vessel may touch at the foreign port for receipt or discharge of cargo. This view of the statute also accords with its construction by the Treasury Department at all times. Under date May 13,

1871, upon consideration of the act of February 10, 1871, out of which section 2793 grew, the department wrote to the collector at Chicago as follows:

"Section 25 of the act approved July 14, 1870, exempts from the payment of tonnage tax all vessels belonging to any citizen of the United States trading from one port or point within the United States to another port or point within the United States, and joint resolution of Congress, approved February 10, 1871, also exempts from tonnage tax enrolled and licensed vessels in the coasting trade, although touching during the voyage at intermediate foreign ports. Under this law, it is the port to which a vessel clears by which it is determined whether she is or is not liable to pay tonnage tax. The rule, therefore, to be observed in the collection of this tax on vessels trading on the northern, northeastern, and northwestern frontiers of the United States is determined by the certificate of clearance on the manifest of the vessel as required by the act of July 1, 1870, and not by the destination of her cargo. If she clears direct to a foreign port, as did the *Kate Darley* for Fort Colburne, Ontario, on the 4th instant, the tonnage tax must be collected." (Synopsis of Treasury Decisions, 1871; Decision 828, p. 20.)

Again, on May 23, 1883, the Treasury Department ruled:

"TREASURY DEPARTMENT,

"May 23, 1883.

"SIR: Your letter of the 7th instant was duly received, transmitting the protest and appeal of Frank McGuire, master of the schooner *Penokee*, against the exaction of a tonnage tax of \$94.70 on her arrival at your port on the 30th ultimo, from Toronto, Canada.

"You transmit the clearance certificate of the *Penokee*, which bears date November 24, 1882, and under the seal of the custom-house at that port allows the master to proceed to your port. The manifest to which it is attached shows the shipment of 630 tons of coal for Toronto and its unloading at that port, and the shipment thence to your port of 12,000 bushels of wheat, which was unladen at Oswego on the 30th ultimo.

"You infer that the voyage of the *Penokee* was concluded on the discharge of her entire manifested cargo at Toronto in November last and her clearance thence, so late as the 29th ultimo, with her cargo of wheat. You base your action on department decisions 2333 and 5311. The first of these decisions ruled that on a voyage between domestic ports on the northern frontiers the discharge of an entire cargo from an American vessel at a port intermediate to the ports of departure and destination closed the trip, because it entailed a new clearance. But no such rule holds when the clearance of such a vessel is from one domestic port to another and she discharges her entire cargo at an intermediate *foreign* port. The law has conceded the privilege to our vessels in the northern lakes of clearing from one domestic port to another, with the privilege of touching at an intermediate *foreign* port. Having granted that privilege, it has not authorized customs officers to inquire into the motives of a master in taking a clearance to another domestic port, nor limited the time to be spent on the voyage, nor made any regulation as to the cargo to be taken on, or discharged at, any intermediate foreign port.

"The collector at the home port of ultimate arrival of a domestic vessel that has touched at an intermediate foreign port needs to inquire only into the genuineness of the clearance, and, if that be right, he need not worry himself that the master has evaded the payment of a tonnage tax which he could not have escaped had he cleared directly to a foreign port. The same view, substantially, was taken in decision 2858, of June 14, 1876, and though the department approves of your effort to enforce what seemed to you the spirit and purpose of the law, it must direct the forwarding of a certified statement in order to a refund of the tax collected.

"The two manifests of the cargoes of the *Penokee* are herewith returned.

"Very respectfully,

"H. F. FRENCH,
"Acting Secretary."

(Synopsis of Treasury Decisions, 1883; Decision 5728, pp. 256, 257.)

Article 303 of the Customs Regulations of 1874 (pp. 150, 151), provides:

“Vessels enrolled and licensed for trade in the waters of the northern frontiers, clearing direct to a foreign port, must pay tonnage tax; but if such vessels clear from a port in one collection district for a port in another collection district and complete the voyage to the port of destination, they are not required to pay tonnage tax, although, during the voyage they may touch at intermediate foreign ports and receive on board dutiable goods and import the same into the United States.”

This regulation is repeated without substantial change in article 284 of the General Regulations under the Customs, 1884 (p. 129); article 284, Customs Regulations, 1899 (p. 85); and article 174, Customs Regulations, 1908 (p. 99).

All these things show that a vessel touches at an intermediate port, within the statute under consideration, when it goes there for delivering or receiving cargo.

2. Does the fact that the *Holden* carried no cargo or passengers from Cleveland, Ohio, to Two Harbors, Mich., take her out of section 2793? Such a view must rest upon an interpretation of the statutory words “engaged in the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States” as demanding that some cargo or some passenger be actually carried on the particular voyage between the American ports of departure and destination as well as between one or the other of the American ports and the intermediate foreign port. Such interpretation I consider untenable; and it is also contrary to the Treasury Department’s decision of May 23, 1883, already quoted.

The relation of section 2793 to section 2 of the act of February 10, 1871, as a mere revision of the latter, will indicate quite decisively that the clause of section 2793 “engaged in the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States” adds nothing to the substantive requirements of the section, but serves merely the ends of limiting the benefits of the section to enrolled and licensed vessels on the stated frontiers and of further describing the character of the enrolled and licensed vessels on the waters of those

frontiers. It makes no requirement, beyond what the rest of the section prescribes, concerning the incidents of the particular voyage. The precursor of section 2793 in the act of February 10, 1871, read:

“And provided further, That enrolled or licensed vessels departing from or arriving at a port in one collection district to or from a port in another collection district, and also touching at intermediate foreign ports, shall not thereby become liable to the payment of entry and clearance fees, or tonnage tax, as if from or to foreign ports; but such vessels shall, notwithstanding, be required to enter and clear.” (16 Stat., 596.)

This language, it will be noticed, extended to enrolled or licensed vessels anywhere; but the section containing the language was an addition to the seventh section of the act of July 1, 1870, regulating, according to its title and terms, “the foreign and coasting trade on the northern, northeastern and northwestern frontiers of the United States.”

Doubtless, therefore, the quoted language of the act of 1871 itself applied only to vessels on the northern, northeastern, and northwestern frontiers; but, whether so or not, it was necessary, if the revision in section 2793 of the second section of the act of February 10, 1871, was to be restricted to vessels on the northern, northeastern, and northwestern frontiers of the United States, that just such a clause as we are discussing—“engaged in the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States”—should be added to the language taken over from the second section of the act of 1871. We have here a plain and adequate explanation of the statutory clause about engagement in trade on the northern frontiers. Without that clause, section 2793 would be applicable to enrolled or licensed vessels anywhere. The clause was essential to restrict the geographical application of section 2793 in the same way as the original section of the act of February 10, 1871, was restricted by the general structure of the act to which it was appended. It is not to be supposed, when we have another adequate explanation, that the new clause put into section 2793 was meant to alter the essential character

of the original statute. Section 2 of the act of February 10, 1871, as we have seen, required only that the vessel be enrolled or licensed; that it travel between American ports in different collection districts; and that it touch at an intermediate foreign port. Section 2793 must not be construed to require more, as the newly added clause has another explanation.

The view that the statutory clause about engagement in foreign and domestic trade requires that at least some freight or at least one passenger be carried between the American ports of departure and destination would also lead to a practical absurdity. Clearly one barrel of freight or a single passenger would suffice. The operation of the statute can not depend upon such a trifle. Also, if some freight or some passenger must be carried between the American ports of beginning and ending the voyage, in order to put the vessel at the time into coasting trade, then equally the statute must require that the vessel carry on the particular voyage some freight or some passenger to or from the intermediate foreign port in order to put the vessel into foreign trade. It can not be, however, that a vessel carrying a cargo from Cleveland to Two Harbors and stopping intermediately at Fort William, Canada, but not taking cargo to or from Fort William, would be outside of this statute. She might have gone to Fort William for the very purpose of getting some cargo there, and met with disappointment. The result of having a cargo entirely domestic makes the case all the stronger for giving the vessel the benefit of the statute, notwithstanding her stop at a foreign port.

I therefore reply to your inquiry that the steamer *Holden*, under the circumstances stated by you, was within the provisions of section 2793 of the Revised Statutes.

Respectfully,

LLOYD W. BOWERS,
Solicitor-General.

Approved:

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

COURT-MARTIAL—EMBEZZLEMENT—ASS'T PAYMASTER IN NAVY.

An Assistant Paymaster in the Navy charged with the duty of keeping safely money intrusted to his care, who was furnished a safe with combination locks on both the outer and inner doors, for the safe-keeping of this money, and who after removing the lock from the inner door of the safe and failing to lock the outer door, left the vessel knowing the condition of the safe, and as a result a portion of the money was lost, is chargeable with negligence equivalent to a criminal intent and is guilty of embezzlement under the provisions of section 88 of the Penal Code of the United States which went into effect January 1, 1910.

DEPARTMENT OF JUSTICE,

May 9, 1910.

SIR: I have the honor to acknowledge receipt of your communication of April 28, 1910, with which you transmit the record of court-martial proceedings in the trial of Assistant Paymaster Lawrence G. Haughey, U. S. Navy, upon the charges of embezzlement in violation of article 14 of the Articles for the Government of the Navy, and culpable negligence in the performance of duty.

There are two charges, the specifications under which read as follows:

"In that Lawrence G. Haughey, an assistant paymaster in the United States Navy, then attached to and serving on board the United States ship *Castine* at Boston, Massachusetts, as paymaster of said vessel, being on the twenty-third day of March, nineteen hundred and ten, as paymaster of said vessel, justly indebted to the United States in the sum of twenty-three thousand two hundred and twenty-three dollars and eight cents, or thereabouts, moneys of the United States under the General Account of Advances, for the safe-keeping and disbursement of which sum in accordance with law he, the said Assistant Paymaster Haughey, was responsible, and having, on said date, in cash on board said ship the sum of one thousand two hundred and eighty-one dollars and forty-six cents, and on deposit with the assistant treasurer of the United States at New York, New York, not drawn against by outstanding checks, nineteen thousand sixty-eight dollars and sixty-two cents, making an aggregate sum of only twenty thousand three hundred and fifty dollars and eight cents ac-

counted for, he, the said Assistant Paymaster Haughey, did fail to safely keep and account for the sum of two thousand eight hundred and seventy-three dollars, or thereabouts, and did, therein and thereby, on or before the twenty-third day of March, nineteen hundred and ten, embezzle the public moneys intrusted to him in the sum of two thousand eight hundred and seventy-three dollars, or thereabouts, lawful money of the United States.

"In that Lawrence G. Haughey, an assistant paymaster in the United States Navy, then attached to and serving on board the United States ship *Castine* at Boston, Massachusetts, as paymaster of said vessel, being on the eighth day of March, nineteen hundred and ten, as paymaster of said vessel, intrusted with certain moneys of the United States in the sum of four thousand dollars, or thereabouts, in cash, under the General Account of Advances, for the safe-keeping of which sum he, the said Assistant Paymaster Haughey, was responsible, and having been furnished a safe with combination locks on both outer and inner doors thereof, as a depository on board said ship for the safe-keeping of the aforesaid moneys of the United States, and well knowing that it was his duty to keep said safe securely locked during his, the said Assistant Paymaster Haughey's absence from said vessel, did, nevertheless, on said date, remove the lock of the inner door of said safe, and did neglect and fail to securely lock the outer door of said safe before he, the said Assistant Paymaster Haughey, left said vessel, and did leave said vessel at or about five hours and thirty minutes post meridian on said eighth day of March, nineteen hundred and ten, knowingly leaving the inner door of said safe without a lock and the outer door of said safe insecurely and incompletely locked; through which neglect and failure the moneys of the United States contained in said safe were unnecessarily subject to the risk of possible loss."

The findings and sentence of the court are in the following language:

"The specification of the first charge 'Proved in part—proved except the words "and did, therein and thereby, on or before the twenty-third day of March, nineteen hundred

and ten, embezzle the public moneys intrusted to him in the sum of two thousand eight hundred and seventy-three dollars, or thereabouts, lawful money of the United States," which words are not proved.'

"And that the accused, Assistant Paymaster Lawrence G. Haughey, United States Navy, is of the first charge 'Not guilty,' and the court does, therefore, acquit the said Assistant Paymaster Lawrence G. Haughey, United States Navy, of the first charge.

"The specification of the second charge 'Proved.'

"And that the accused, Assistant Paymaster Lawrence G. Haughey, United States Navy, is of the second charge 'Guilty.'

"The court therefore sentences him, Assistant Paymaster Lawrence G. Haughey, United States Navy, to lose ten (10) numbers in his grade, and to be publicly reprimanded by the Secretary of the Navy."

The questions presented are (1) whether or not, under the findings of the court, Assistant Paymaster Haughey was guilty of embezzlement, and (2) whether upon the law and facts of the case your department would be justified in returning the record to the court for revision.

The first charge was drawn under the eighth clause of the 14th Article for the government of the Navy (Rev. Stat. sec. 1624), which reads as follows:

"Fine and imprisonment, or such other punishment as the court-martial may adjudge, shall be inflicted upon any person in the naval service of the United States—

* * * * *

"Who steals, *embezzles*, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully and knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence, stores, money or other property of the United States, furnished or intended for the military or naval service thereof."

The word "embezzlement" is not here defined, and consequently, it is necessary to look to the offense as defined in the penal statutes relating to United States officials who are charged with the duty of holding and disbursing funds belonging to the Government, in order to determine of what elements the offense consists.

Sections 87, 88, 89, 90, 91, and 92 of the Penal Code, which went into effect January 1, 1910, declare what constitutes the offense of embezzlement upon the part of such government officials, and said sections read as follows:

"SEC. 87. Whoever, being a disbursing officer of the United States, or a person acting as such, shall in any manner convert to his own use, or loan with or without interest, or deposit in any place or in any manner, except as authorized by law, any public money intrusted to him; or shall, for any purpose not prescribed by law, withdraw from the Treasurer or any assistant treasurer, or any authorized depository, or transfer, or apply, any portion of the public money intrusted to him, shall be deemed guilty of an embezzlement of the money so converted, loaned, deposited, withdrawn, transferred, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.

"SEC. 88. If the Treasurer of the United States or any assistant treasurer, or any public depository, fails safely to keep all moneys deposited by any disbursing officer or disbursing agent, as well as all moneys deposited by any receiver, collector, or other person having money of the United States, he shall be deemed guilty of embezzlement of the moneys not so safely kept, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years.

"SEC. 89. Every officer or other person charged by any act of Congress with the safe-keeping of the public moneys, who shall loan, use, or convert to his own use, or shall deposit in any bank or exchange for other funds, except as specially allowed by law, any portion of the public moneys intrusted to him for safe-keeping, shall be guilty of embezzlement of the money so loaned, used, converted, deposited or exchanged, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years.

"SEC. 90. Every officer or agent of the United States who, having received public money which he is not authorized to retain as salary, pay, or emolument, fails to render

his accounts for the same as provided by law shall be deemed guilty of embezzlement, and shall be fined in a sum equal to the amount of the money embezzled and imprisoned not more than ten years.

"SEC. 91. Whoever, having money of the United States in his possession, or under his control, shall fail to deposit it with the Treasurer, or some assistant treasurer, or some public depositary of the United States, when required so to do by the Secretary of the Treasury, or the head of any other proper department, or by the accounting officers of the Treasury, shall be deemed guilty of embezzlement thereof, and shall be fined in a sum equal to the amount of money embezzled and imprisoned not more than ten years.

"SEC. 92. The provisions of the five preceding sections shall be construed to apply to all persons charged with the safe-keeping, transfer, or disbursement of the public money, whether such persons be indicted as receivers or depositaries of the same."

It will be observed that in the specification the sole act, which is alleged as constituting the embezzlement, is that the accused "did fail to safely keep and account for the sum of two thousand eight hundred and seventy-three dollars, or thereabouts." Furthermore, in the finding and the sentence, the court refused to find that the money was actually appropriated by the accused, or that he made any particular disposition of it. Consequently, neither the specification nor the finding bring the case within section 87 or 89 above quoted, because those sections specify certain ways by one of which the money must be disposed of in order that the offense declared thereby be committed. Moreover, neither section 90 nor 91 applies, because section 90 refers to the rendition of accounts, and section 91 to a failure to deposit money with certain officials when required to do so by the Secretary of the Treasury or the head of any other proper department, or the accounting officers of the Treasury. Therefore, if the accused is guilty of embezzlement, it must be under section 88, which provides that if the Treasurer of the United States, or any assistant treasurer, or any public depositary, *fails safely to keep* all moneys deposited by any disbursing officer or agent, as well as all moneys deposited by any collector or

receiver or other person having moneys of the United States in charge, he shall be deemed guilty of embezzlement of the moneys *not so safely kept*.

While this section, upon its face, purports to apply only to the Treasurer, assistant treasurers, and public depositaries, yet by section 92 the provisions of each of the foregoing sections are made applicable to *all persons charged with the safe-keeping, transfer, or disbursement of the public money*, whether such persons be indicted as receivers or depositaries of the same.

Section 92 is identical with section 5493, Revised Statutes, while the five preceding sections are in substance the same as sections 5488 to 5492, Revised Statutes; and, if there could otherwise be any doubt that it was intended by section 5493 to make *each* of the preceding sections applicable to all officers and United States officials whose duty it is to receive, hold, and disburse public moneys, that doubt would be removed by section 23, chapter 36, of the act of February 8, 1875 (18 Stat. 312), which provides:

"That all acts and parts of acts imposing fines, penalties, or other punishment for offenses committed by an internal revenue officer or other officer of the Department of the Treasury of the United States, or under any bureau thereof, shall be, and are hereby, applied to all persons whomsoever employed, appointed, or acting under the authority of any internal revenue or customs law, or any revenue provision of any law of the United States, when such persons are designated or acting as officers or deputies, or persons having the custody or disposition of any public money."

Does, then, the specification under the first charge allege such facts as constitute the offense of embezzlement, and does the finding of the court render the accused, as a matter of law, guilty of that offense?

Embezzlement, under said section 88 of the Penal Code, consists in the officer's failure to *safely keep* the moneys intrusted to his care, and, as above shown, it is specifically alleged in the specification under the first charge that the accused did fail to safely keep and account for the sum of \$2,873.

Without here undertaking to pass upon the necessity of a fraudulent or criminal intent or knowledge upon the part of the accused, it is sufficient to say, that if such intent or knowledge were necessary, their absence, under the positive provisions of this statute, would be a matter of defense, and it would not be necessary to specifically declare their presence in the specification. The rule might be different as to an indictment found in criminal proceedings in a court of law, but all the technicalities which have been applied to common-law indictments are not required in specifications in court-martial proceedings. Here it is sufficient if the facts constituting the offense be described with such certainty as to clearly inform the accused of his alleged misconduct and of the offense with which he is charged. (7 Op. 605.)

The principal question is, whether or not the findings of the court-martial constitute, as a matter of law, the offense of embezzlement. By the prosecution it is insisted that the failure of the accused to safely keep the money intrusted to his care of itself constitutes the offense, and that it was not necessary that any willful knowledge or evil intent as to the disposition of the money be proven; while for the defense it is insisted that before an accused can be found guilty of embezzlement, it must appear that his failure to account for the money was the result of some intent to defraud the Government, or, at least, of some act willfully and knowingly done, which the accused knew would cause the loss of the money.

Many authorities may be found to support both contentions. A number of the cases supporting the theory of the prosecution are cited in the opinion of the Circuit Court, in *United States v. Bayaud* (16 Fed. 376, 384, 385), wherein it was held that under the statute which required the destruction of stamps taken from a cask containing distilled spirits, the accused is bound to know the facts and obey the law at his peril, and that a conviction may be had without charging in the indictment a knowledge of the contents of the cask from which the stamps were removed. Many of the same authorities and others of like character are cited in 1 Wharton Criminal Law (7th ed.), sec. 83, and in note 4, 3 Greenleaf on Evidence (16th ed.), sec. 21.

Extreme cases are *United States v. Adler* (Fed. Case No. 14424), wherein it was held that a person engaged in rectifying, whose employees empty spirits from casks and packages, is one who causes such emptying, so as to be guilty of a felony, although he may not be present or have any personal knowledge as to the emptying or intention to empty.

Regina v. Woodrow (15 Meeson & Welsby, 404), where the accused was found guilty of having in his possession adulterated tobacco, when it was found as a fact that he had purchased the tobacco under the belief that it was unadulterated, and had no knowledge of its adulteration until it was analyzed by the government authorities; and

Com. v. Thompson (11 Allen, 23), in which it appeared that a woman married and lived a short while with her husband, but was compelled to leave him on account of his dissipated habits. She afterwards read in a newspaper of a man being killed in a drunken row whom she had every reason to believe, and did believe, was her husband, and she thereafter represented herself to be a widow. Eleven years after she last saw or heard of her husband she married another man. It developed that the first husband was not, in fact, dead, and the second husband was thereupon indicted and found guilty of adultery for cohabiting with the woman under the second marriage.

On the other hand, it is said in Bishop's New Criminal Law (8th ed.), vol. 1, sec. 287:

"There can be no crime, large or small, without an evil mind. In other words, punishment is the sequence of wickedness, without which it can not be. And neither in philosophical speculation, nor in religious or moral sentiment, would any people in any age allow that a man should be deemed guilty unless his mind was so. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it can not exist."

And, further, in section 291:

"Though we sometimes find judges inconsiderately making exceptions to this doctrine, in the just truth of the law it is universal. If a case is really criminal, if the end sought is punishment and not the redress of a private wrong, no

circumstances can render it just, or consistent with a sound jurisprudence, for the court or a jury to condemn the defendant unless he was guilty in his mind. As the laws of the material world act uniformly, never knowing exceptions, so do those of the moral world. It is never right to punish a man for walking circumspectly in the path which appears to be laid down by the law, even though some fact which he is unable to discover renders the appearance false. And for the government, whether by legislation or by judicial decree, to inflict injustice on a subject, is to injure itself more than its victim. And a court should in all circumstances so interpret both the common law and the statutes as to avoid this wrong."

And note 6, section 303a, paragraph 3, page 174, contains an elaborate discussion of the question, in which the author cites and analyzes many of the decisions cited holding to the contrary; and argues with force that into every legislative act creating an offense, there must, as a matter of necessity, be read some exceptions; as, for illustration, while criminal statutes do not declare that their provisions shall not apply to insane persons or to infants under seven years of age, yet, in construing these acts, such exceptions are always implied; and that, in like manner, a criminal statute should be so construed as to require an evil intent, even though such intent be not required by express language.

As favoring this view may be cited *Dimmick v. United States* (121 Fed. 638, 643), wherein the accused had been indicted for embezzlement for failure to deposit money as required by section 5491, Revised Statutes (Penal Code, sec. 90). It was contended in the Court of Appeals that the trial court erred in refusing to instruct the jury that the accused should be acquitted if he had no notice or knowledge that he was required to deposit the money on December 31, 1900, and with reference thereto the court said:

"The court properly instructed the jury on this branch of the case, and charged them that, in order to hold the plaintiff in error guilty of a violation of the statute, they must find that his failure to deposit was *intentional and*

willful, and in that connection the court read to the jury the section of the statute under which the indictment was found."

In *United States v. Ninety Nine Diamonds* (139 Fed. 961, 966, et seq.), the diamonds had been seized under the statute making it an offense to make, or attempt to make, any entry of imported merchandise by means of any false or fraudulent invoice, affidavit, or otherwise, and authorizing the forfeiture of the goods under such circumstances. The Court of Appeals, Eighth Circuit, held that the "false and fraudulent" in statutes and contracts which impose forfeitures or penalties for false acts or acts falsely done, generally imply *culpable negligence* or wrong, and that:

"They signify more than incorrect or incorrectly, and mean knowingly or intentionally or negligently false or falsely, in the absence of express provisions in the statutes or contracts themselves, or reasonable implications from them, their subjects, and the circumstances to the contrary (p. 968);" and in support of this position cited cases decided by numerous courts, both federal and state.

A question of a similar nature was presented to the Supreme Court of the United States in *Armour Packing Co. v. United States* (209 U. S. 56, 85, 86), wherein the appellant had been convicted for receiving a rebate. It was insisted that there was nothing in the facts to show any intentional violation of the law, but that on the contrary, the petitioner believed that it was within its legal rights in insisting upon the performance of its contract, and maintained in good faith that the interstate commerce act did not and could not interfere with it. Upon this subject the court said:

"While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases within which we think the one under consideration falls, where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong. In this case the statutes provide it shall be penal to receive

transportation of goods at less than the published rate. Whether shippers who pay a rate under the honest belief that it is the lawfully established rate, when in fact it is not, are liable under the statute because of a duty resting on them to inform themselves as to the existence of the elements essential to establish a rate as required by law, is a question not decided because not arising on this record. The stipulated facts show that the shippers had knowledge of the rates published and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required."

It might be implied from this remark of the court that an intent to commit an act which constitutes the offense is essential, but the court leaves undecided the vital question whether the accused would be guilty in case he was honestly mistaken as to a material element in the facts.

It therefore appears that the authorities are in sharp conflict, and that the question is one not definitely settled by the United States courts, but with an apparent leaning in favor of the position that there must be knowledge of the act which constitutes the offense, and an intent to commit such act, although knowledge that the act will constitute a criminal offense is not necessary, as the want of such knowledge would be only ignorance of the law.

But, I am of the opinion that in the present controversy it is unnecessary to adopt either of the views contended for.

A general principle, recognized in all the authorities, is that there may be such character of negligence as will take the place of criminal intent. As said in *I Bishop New Criminal Law*, section 313:

"There is little distinction except in degree between a will to a wrongful thing and an indifference whether it is done or not; therefore, carelessness is criminal, and within limits supplies the place of the affirmative criminal intent."

In *United States v. Thomson* (12 Fed. 245, 248), it was said, "In many cases negligence or indifference to duty or consequences is equivalent to a criminal intent;" and, consequently, the master of a vessel was found guilty of permitting the vessel to be overloaded with passengers, without himself knowing or taking any steps to know how

many passengers were on board, on the ground that the statute imposed upon him the active duty of ascertaining the number taken on board, and his neglect of this duty was equivalent to a criminal intent.

None of the cases holding that an intent is a necessary ingredient of a criminal offense are antagonistic to this theory, because the question of negligence did not arise therein, and was not considered.

It was clearly the intention of Congress, in enacting the provisions heretofore quoted, requiring the safe-keeping of money by officials intrusted therewith, that the greatest diligence and care should be exercised by them, and that every precaution should be taken to safely keep and account for the same. If money should be lost by robbery, or fire, or by any accidental means, after every precaution had been exercised by the official having it in his possession, it would indeed be a harsh rule that would not only hold him and his sureties liable for the same, but would confine him in the penitentiary for its loss; but, where he is guilty of gross negligence, as a direct result of which the money is lost, both the letter and the spirit of the statute have clearly been violated, and every necessary element of the crime is present. To hold otherwise would practically nullify section 88 of the Penal Code, as apparently all other methods of loss, except accidental, which could be thought of, are enumerated in sections 87 and 89.

In the specification under the second charge it is alleged that Assistant Paymaster Haughey had been furnished a safe, with combination locks on both the outer and inner doors, for the safe-keeping of this money; that, notwithstanding he well knew that it was his duty to keep the safe securely locked during his absence from the ship, yet on the day mentioned he removed the lock from the inner door of the safe and failed and neglected to lock the outer door, and, knowing that the safe was in this condition, he left the vessel; and that, as a result of this negligence, the money was lost; and the court-martial found as a fact that these allegations were true.

I am of the opinion, therefore, that in view of the very stringent terms of this statute, the conduct of Assistant

Paymaster Haughey in *knowingly* leaving the safe in the condition described, was equivalent to a criminal intent, and that he was guilty of embezzlement under the provisions of section 88 of the Penal Code.

I am further of the opinion that you would be justified in returning the record to the court-martial for revision, but as to whether or not you shall do so, is a question of policy which addresses itself to your department alone.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

CIVIL SERVICE—APPOINTMENT—PREFERENCE—SOLDIERS
AND SAILORS.

Preference in the matter of appointment to civil office accorded by section 1754 of the Revised Statutes to persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty, is not subject to the law of apportionment and extends over all others on the eligible list irrespective of their rating.

DEPARTMENT OF JUSTICE,
May 12, 1910.

SIR: I have the honor to acknowledge the receipt of your letter of the 18th ultimo, inclosing a communication from the Civil Service Commission in regard to the adjustment of various contrariant decisions and rulings in respect to the preference in the matter of appointment to civil office accorded by section 1754 of the Revised Statutes to persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty.

The decisions and rulings which it is sought to harmonize are thus stated in a memorandum prepared by the commission:

“The commission has throughout its history treated eligibles under section 1754, R. S., as entitled to be certified before all others on the same register. The practice is set forth in the inclosed circular relating to veteran preference.

Eligibles entitled to preference have been certified first even when the States in which they were residents had already received an excess of appointments under the apportionment and all other eligibles from the same States were for that reason excluded from that certification.

"In an opinion of August 18, 1909 (27 Op. 546, 563), rendered in connection with the census act approved July 2, 1909, the Attorney-General held:

"‘Nor do these statutes’ (referring to section 1754, R. S., and section 7 of the civil-service act) ‘interfere with the rule of apportionment established by section 2 of the act of 1883, and reenacted for the census service in section 7 of the act of 1909. The preference would apply whenever in the eligible register of applicants residing and domiciled in a particular State or Territory, out of the number to which such State or Territory is entitled in conformity to the law of apportionment, an honorably discharged soldier or sailor shall have qualified and shall be inscribed on the register. Such applicant must be preferred for appointment over others similarly qualified and inscribed on the same register.’

"The following letter from the Secretary of Commerce and Labor, dated January 6, 1910, indicates the manner in which it is proposed to give effect to section 1754, R. S., in appointments under the census act approved July 2, 1909:

"‘The eligible registers resulting from the examination for the Census Bureau, held on October 23 last, which were recently forwarded by the commission to the Director of the Census, contain the names of several persons who were allowed preference by the commission under section 1754 of the Revised Statutes. In each such case the commission placed the name of the person to whom preference was allowed at the head of the appropriate register.

"The question having arisen as to whether the requirement of section 7 of the act of July 2, 1909 (the thirteenth census act), that selections should be made from the register *in the order of rating*, would permit the selection of preference claimants ahead of those not preference claimants who made higher ratings in the examination, the

matter was submitted to the department's solicitor for a legal opinion. The gist of the solicitor's opinion is contained in the following paragraph:

“In view of the position taken by the Attorney-General in construing section 1754, R. S., as above indicated, I am of opinion that that section and section 7 of the thirteenth census act should be construed as two harmonious expressions of the legislative will, and that, therefore, as between eligibles of the same rating, those who have been honorably discharged from the military or naval service, as contemplated by section 1754, should be given the preference in the matter of appointment, but that, as between eligibles of different ratings, those of higher ratings should take precedence over those of lower rating irrespective of the provisions of section 1754, R. S.’

“In view of the foregoing, the Director of the Census will place the names of persons who have been allowed preference on the appropriate register (or registers) above those who make the same rating and below those who make higher ratings.’

“The opinion of the Attorney-General of August 18, 1909, and the letter of the Secretary of Commerce and Labor of January 6, 1910, seem to place two new constructions on section 1754, R. S., as follows:

“1. Certification of preference claimants only when their States are in order of appointment under the apportionment.

“2. Certification of preference claimants only before other persons who are equally qualified; that is, having the same general averages in the examination.

“A uniform interpretation and practice are desirable.”

Section 7 of the civil-service act of January 16, 1883 (22 Stat. 406), provides:

“That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein

contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes; nor shall any officer not in the executive branch of the Government, or any person merely employed as a laborer or workman, be required to be classified hereunder; nor, unless by direction of the Senate, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination."

Upon further consideration of this matter, in the light of all the provisos to section 7, and especially in view of the practical construction placed by the commission upon section 1754 of the Revised Statutes (which construction, I may say, had not heretofore been called to my attention), I am of the opinion that the preference conferred upon persons honorably discharged from the military or naval service by section 1754 is not subject to the rule of apportionment prescribed by paragraph 3 of section 2 of the civil-service act. While the introductory words of the first proviso to section 7, "but nothing herein contained," suggest a reference to the preceding part of that section alone, which relates simply to examination for appointment and promotion, the last two provisos, which exempt certain officers and employees of the Government from classification, indicate that the qualifying clauses had reference to the entire act, as the subject of classification is dealt with in section 6. If so, the preference accorded to veterans by section 7 would override the provision as to apportionment in section 2. Even if the matter be a doubtful one, such doubt should, as you suggest, be resolved in favor of the uniform and long-continued construction placed upon the statute by the department of the Government charged with its administration. (*United States v. Philbrick*, 120 U. S. 52; *United States v. Johnston*, 124 U. S. 236; *Robertson v. Downing*, 127 U. S. 607; *Hastings, etc., Railroad Co. v. Whitney*, 132 U. S. 357, 366; *Merritt v. Cameron*, 137 U. S. 542.)

I am also of the opinion that the Solicitor of the Department of Commerce and Labor, in the case referred to in the commission's memorandum, has placed too narrow a construction upon the preference conferred by section 1754. To hold that that preference exists only in favor of a person honorably discharged from the military or naval service where he has the same "rating" as another on the eligible list, will practically destroy the preference altogether, as the occasions will be rare when the matter of appointment (which, under the rules, goes to the highest on the eligible list) lies between a veteran and another person having exactly the same rating. It is true that the statutes do not exempt honorably discharged soldiers and sailors from examination, and equal qualifications for the office may be required. (17 Op. 194; 19 *id.* 318; 24 *id.* 64.) But all persons who have passed the necessary examination are, under the civil service act and rules, presumed to be equally qualified for the office which they seek. Their rating simply determines the order in which they shall be certified for appointment, the one having the highest rating being preferred. (Civil Service Rules VI, VII.) In other words, qualification or eligibility is determined by passing the examination, while rating merely establishes the order of preferment. But section 1754 of the Revised Statutes gives honorably discharged soldiers and sailors who possess the requisite qualifications preferment above all others, and this is the rule established by paragraph 2 of Rule VI of the civil-service act, which provides:

"All competitors rated at 70 or more shall be eligible for appointment, and their names shall be placed on the proper register according to their ratings; but the names of persons preferred under section 1754, R. S., rated at 65 or more, shall be placed above all others."

It follows, therefore, that in the respects above referred to the practice of the commission and the rules promulgated by the President should be adhered to.

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

**DRY DOCK OF SKINNER SHIP BUILDING, ETC., COMPANY,
BALTIMORE, MD.—RIGHT OF UNITED STATES TO USE THE
DOCK.**

The Skinner Ship Building and Dry Dock Company, successors to the Baltimore Dry Dock Company, of Baltimore, Md., whose dry dock is on the Fort McHenry tract in Baltimore on land which was conveyed to the Baltimore Dry Dock Company by the United States under the authority of the act of June 19, 1878 (20 Stat. 167), on conditions therein stated, is required to accord to the United States the right to use the dry dock at any time "for the prompt examination and repair of vessels belonging to the United States, free from charge for docking." The Skinner Company has no right to prevent the United States from employing the crew of one of its vessels, or any other person, from making repairs to the bottom or any other part of such vessel while it is in the dry dock.

That company may attach a condition, of the character described, to its proposal to do the work of docking, cleaning, and repairing of the ship, but if the Government declines the proposal the company can not interfere with the work of any other person or company that may bid for the work.

DEPARTMENT OF JUSTICE,

May 12, 1910.

SIR: I am in receipt of a communication addressed to you by Captain Ross, of the Revenue-Cutter Service, requesting my opinion as to the construction of section 2 of an act approved June 19, 1878 (20 Stat. 167), in its application to a question presented by him.

It appears from his communication that proposals were invited for making certain repairs to the machinery and for docking, cleaning, and painting the bottom of the U. S. revenue cutter *Itaska*; that the only proposal received for performing this work was from the Skinner Ship Building and Dry Dock Company, whose proposal contained a restriction that the ship's crew would not be allowed to do any work on the bottom of the vessel; that the Skinner Ship Building and Dry Dock Company is the successor to the Baltimore Dry Dock Company of Baltimore; that the dry dock in question is located on part of the land belonging to the United States, known as the Fort McHenry tract, which land was conveyed to the Baltimore Dry Dock Company under authority of act of Congress of June 19, 1878, above referred to. By that

act the Secretary of War was directed to convey certain designated property in the Fort McHenry tract to the Baltimore Dry Dock Company, in consideration of which conveyance the latter company was required to construct upon the land conveyed, within two years from the date of the conveyance, an efficient Simpson's Improved Dry Dock, and "to accord to the United States the right to the use forever of the said dry dock, at any time, for the prompt examination and repair of vessels belonging to the United States, free from charge for docking."

It further appears from Captain Ross's letter that the Spedden Marine Railway Company, which was also invited to submit a proposal for the work, has stated that it was not prepared to dock the ship, and would be dependent upon the Skinner Ship Building and Dry Dock Company for docking, and that that company would not allow it to perform the work on the vessel's bottom at the dry dock in question.

Captain Ross further states that it was the intention to have the work of renewing the protecting zincs done by the members of the crew, thereby making a saving to the Government; that if the restriction placed in the proposal by the Skinner Ship Building and Dry Dock Company is allowed to stand, it will necessitate an additional expense, for the reason that such work, which could be satisfactorily performed by the crew of the vessel, must be performed by the Skinner Ship Building and Dry Dock Company; and upon this state of fact Captain Ross asks the following questions:

"1. Is not the Skinner Ship Building and Dry Dock Company required to accord to the United States the right to have its vessels docked free of charge, at the dry dock before referred to, when a contract for repairs is entered into with another company, without imposing any limitations or conditions?

"2. Has the Skinner Ship Building and Dry Dock Company the right to prevent the United States from employing the crew of the vessel, or other persons, in making repairs on the bottom, or any other part of the vessel, while the said vessel is in the said dry dock?"

In reply I beg to say (1) that in my opinion the Skinner Ship Building and Dry Dock Company is required to accord to the United States the right to the use of the dry dock at any time "for the prompt examination and repair of vessels belonging to the United States, free from charge for docking."

(2) That the Skinner Ship Building and Dry Dock Company has not the right to prevent the United States from employing the crew of the vessel, or any other person, in making repairs to the bottom or any other part of the vessel while such vessel is in the dry dock.

Of course the Skinner Ship Building and Dry Dock Company has a right to attach to its proposal to do the work of docking, cleaning, and repairing the ship, the condition that the work of cleaning and repairing the bottom of the ship shall not be done by the crew, but that the entire work shall be awarded to it. If the Government does not choose to accept that proposal, however, the Skinner Ship Building and Dry Dock Company has no right to interfere with the work of any other concern which may be willing to bid for the work on the conditions imposed by the Government.

I am not furnished with a copy of the conveyance executed to the Baltimore Dry Dock Company of Baltimore City pursuant to the provisions of the act of June 19, 1878, above referred to, and therefore can not say whether the failure or refusal of the Skinner Ship Building and Dry Dock Company, as successor to the Baltimore Dry Dock Company of Baltimore City, to accord to the United States the above-mentioned right, would be a sufficient cause for a forfeiture of the property on which the dock is situated; but in my opinion a bill in equity would lie at the suit of the United States to enjoin the Skinner Ship Building and Dry Dock Company from interfering with the exercise by the United States of the right reserved to it, in the conveyance aforesaid, to use the said dry dock at any time for the prompt examination and repair of vessels belonging to the United States by agents properly designated on behalf of the United States for that purpose, free from charge for

docking. It is possible that if this be called to the attention of the Skinner Ship Building and Dry Dock Company it will yield its contention, otherwise the United States attorney in Baltimore, if you request it, may be instructed to bring appropriate proceedings to enforce the rights of the United States; and if you were to reject the proposal of the Skinner Ship Building and Dry Dock Company to do the work on the conditions above mentioned and invite new proposals, possibly before it became necessary to act thereon, an injunction could be secured from the United States court restraining the company from interference with the exercise by the United States of the rights secured to it by the statute in question.

I have the honor to be,

Very respectfully, yours,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

CLAIMS OF SPANISH SUBJECTS RESIDING IN FLORIDA
UNDER TREATY OF 1819.

The Attorney-General reviews claims of Spanish subjects residing in Florida arising under the provisions of the treaty of 1819 with Spain, but declines to express an opinion upon the merits of said claims for the reason that all open questions have been settled by uniform rulings of the administrative officers of the Government and the matter has been repeatedly passed upon by his predecessors in office.

DEPARTMENT OF JUSTICE,

May 13, 1910.

SIR: On April 14 your Secretary transmitted to me, for my consideration, a communication addressed to you by John Mason Brown, esq., of Washington, D. C., communicating certain facts and contentions relative to claims of Spanish subjects residing in Florida, arising under the provisions of the treaty of 1819, between the Kingdom of Spain and the United States. Mr. Brown's letter asked that you refer the matter to me, with a request for a full review and an expression of my opinion concerning the rights of claimants to the unpaid portion of the award.

I beg to submit to you the following review of the subject, and to state why I am unable to express any opinion upon the merits of the claims.

These claims arose under a clause of the ninth article of the treaty of February 22, 1819. The English version is as follows:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida." (8 Stat. 260.)

Congress passed "An act to carry into effect the ninth article of the treaty, etc.," approved March 3, 1823. (3 Stat. 768.) It provided that the judges of the superior courts established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed to receive and adjust all claims arising within their respective jurisdictions, of the inhabitants of said territory, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said territory was ceded to the United States.

The second section is as follows:

"That, in all cases in which said judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be, by said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged, out of any money in the Treasury, not otherwise appropriated."

The judges of the superior courts in west and east Florida proceeded, under this statute, to receive and adjust claims. There had been invasions of west Florida in 1814 and 1818 by the United States troops under General Jackson. There had been an unauthorized occupation of a part of east Florida by volunteers and United States troops in 1812 and 1813, during which much property of Spanish inhabitants had been destroyed or seized. When the claims were reported to the Secretary of the Treasury, Mr.

W. H. Crawford, under the act of 1823, he decided that the injuries in 1814 in west Florida were not embraced by the treaty. Mr. Secretary Rush, who succeeded Mr. Crawford, placed the same construction on the treaty as to the claims for injuries in east Florida resulting from the invasions of 1812 and 1813. The officers decided that the use of the term "late operations of the American army in Florida" confined the claims to those arising out of the invasion of 1818.

Application was then made to Congress for the avowed purpose of reversing these decisions; and an act was passed "for the relief of certain inhabitants of east Florida," June 26, 1834 (6 Stat. 569), which was as follows:

"That the Secretary of the Treasury be, and he hereby is, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, the amount awarded by the judge of the Superior Court at St. Augustine, in the Territory of Florida, under the authority of the one hundred and sixty-first chapter of the acts of the Seventeenth Congress, approved March 3, 1823, for losses occasioned in east Florida, by the troops in the service of the United States, in the years 1812 and 1813, in all cases where the decision of the said judge shall be deemed, by the Secretary of the Treasury, to be just: *Provided*, That no award be paid, except in the case of those who, at the time of suffering the loss, were actual subjects of the Spanish Government: *And provided, also*, That no award be paid for depredations committed in east Florida, previous to the entrance into that province of the agent or troops of the United States."

Although claims for injuries in 1812 and 1813 had been presented and decrees made for the claimants before, until the passage of this act there was no way by which payment could be made. The time for filing the claims was limited within one year.

These claims were then duly presented to the judges of the superior courts and by them adjusted; and, when allowed, the amounts awarded were reported to the Secretary of the Treasury. These awards allowed interest at 5 per cent upon the amounts, by way of damages, from the date of the award until payment.

Mr. Levi Woodbury, Secretary of the Treasury, to whom the first of these claims adjudicated were presented, took two positions: First, that it was the intention of Congress by this legislation to give to the Secretary of the Treasury a supervisory authority over the award of the judges; and, second, that the claimants were not entitled to interest upon the amount found to be the value of the property taken or destroyed, as an equivalent for the loss of its use.

The decision of Mr. Woodbury was adhered to by him in the settlement of the claims; and it was followed by his successors. Many claims were proved under these acts and certified to the several Secretaries of the Treasury, and paid by them as the claims were deemed to be just; but in all these cases paid without interest.

In 1841, Mr. Ewing being Secretary of the Treasury, for the first time the matter of the east Florida claim was referred to the Attorney-General for his advice and opinion. The questions submitted were: First. How far the power vested in the Secretary of the Treasury to review the decree or award of the judge authorizes him to go in recommending, setting aside, or modifying such award or decree. Second. Whether the award of interest in the amount of damages (which our Government has hitherto refused to pay) is rightly made; or, in other words, are the United States bound to pay interest on the damages awarded in these cases when it has been awarded.

Attorney-General Crittenden answered the first question as follows:

"* * * my opinion is that the Secretary of the Treasury is not to act by 'setting aside or modifying,' in terms, the award or decree of the judge; but that the Secretary is invested with a jurisdiction as plenary to decide upon the whole case as the judge himself; and that in his revision and decision thereof he ought to decide according to his judgment of the justice of the case, uncontrolled by the previous decision of the judge; and that the decision of the judge, in its effects, is set aside or modified just to the extent of the disagreement or concurrence therein of the Secretary."

To the second question he answered:

"In this instance, the single inquiry is not whether interest ought, in justice, or on any principle of analogy, to be allowed; but whether the judge has been invested with any authority to award it. And this depends upon the proper construction of the act of Congress of the 26th of June, 1834. His whole and sole authority is derived from that act; it is the standard by which his jurisdiction must be measured and limited. What is it? By the terms of the act he is 'authorized to receive and examine and adjudge all cases of claims for losses occasioned by the troops' in the service of the United States in 1812 and 1813. Interest on the amount of such 'losses' is certainly a thing very distinguishable and different from the 'losses' themselves. It may be that justice would have required in this case the allowance of interest, as well as of the principal that was lost. But Congress alone was competent to determine the extent of its obligations, and to give or withhold authority for the allowance of the principal; that is, the value of the property lost, with or without interest. The whole subject was before them for consideration and legislation; and the question of interest was as important in amount as the principal. They did legislate and provide for the liquidation and payment of claims for losses, but made no provision for any claims of interest." (3 Op. 635, 638, 639.)

In 1841 Mr. Forward, Secretary of the Treasury, referred the question of the principles which ought to govern the Department of the Treasury to Attorney-General Legaré. Mr. Legaré's opinion is confined to the construction of the acts of 1823 and 1834 as to the supervisory power of the Secretary of the Treasury. He treats the acts as being *in pari materia*, as they have always been considered. He says:

"It is the plain meaning of the two acts, that the Secretary of the Treasury is to pay the claims on which a favorable report may have been made by the judge of the Superior Court of St. Augustine, only in cases where, upon an examination by the department of such decision, as well as of the evidence on which it is founded, that decision shall be deemed by the Secretary of the Treasury to be

just. In other words, Congress meant to bind itself by the reference to judicial examination, only so far as the head of the Treasury Department should be satisfied with its results. The examination of the judge is to enlighten the mind of the Secretary, just as the verdict of a jury in a feigned issue is to enlighten the conscience of a chancellor; and in both cases with precisely the same freedom on the part of him whose decree is to be final, to follow, after all, his own sense of what belongs to the real equity of the case." (3 Op. 677.)

Again this matter of the east Florida claims was referred by the Secretary of the Treasury, Mr. John C. Spencer, to the Attorney-General. Mr. Attorney-General Nelson, referring to the opinion of his predecessor, Mr. Crittenden, upon the question of interest and regarding it as a closed question, takes occasion to coincide with that opinion. He gives an additional reason for advising that interest is not allowable upon these claims. He says:

"* * * In 1834 Congress was called on to correct an error in the interpretation of the act of 1823, committed, as it was alleged, to the prejudice of the claimants, whose rights were designed to be guaranteed by the ninth article of the treaty of 1819. Thus called on, and doubtless aware of the usage of the department to disallow interest upon the claims conceded to be provided for by the law, the legislative department of the Government, by the second section of the said law, authorized the Superior Court of St. Augustine to receive, examine, and adjudge all cases of claims for losses occasioned by the troops of the United States in 1812 and 1813, which are to be paid by virtue of the authority conferred by the second section of the act of 1823, making no provision for the payment of interest that had accrued or might thereafter accrue upon such claims. Now, it strikes me as clear that the omission in the act of 1834 to direct the payment of interest should, under the circumstances, be regarded as a recognition of the settled practice of the department to disallow it; and that, therefore, the executive authority can not be properly exerted in subversion of its own uniform rule of action, and this significant sanction of it by Congress.

I do not mean to say that upon the principles of a broad and liberal equity, the present claimant may not be entitled to interest upon his demand. That is a question upon which I express no opinion. All that I intend to urge is, that under the established usage of the Treasury Department, over and over again sanctioned by the opinions of the law officers of the Government, the Secretary had no authority to allow it." (4 Op. 286, 293.)

These claimants were, however, persistent in their efforts to get favorable action by the Secretaries of the Treasury. All questions arising upon the claims for injuries under the ninth clause of the treaty were propounded to the Attorney-General by Mr. R. J. Walker, the then Secretary of the Treasury, in February, 1849. The comprehensive questions were:

"First. Whether the provisions of the treaty require the losses or injuries for which satisfaction is provided to be established judicially? And, if so, whether decrees of the judges as to the amount or extent of said losses or injuries, as to cases within the provisions of the treaty are final?

"Second. Whether the measure or rate of compensation adopted and applied by the judges in these cases, namely, to add to the value of the property at the time of its loss interest, as a compensation for the loss or deprivation of its use, is or is not in accordance with the laws and usages of nations as the rule of redress for such injuries and can be allowed and paid by this department under the acts of Congress applicable to this subject?"

These questions remained unanswered for a long time, and on April 16, 1851, Mr. Crittenden, who had again been appointed Attorney-General, through the Acting Secretary of the Treasury, at the instance of the claimants, gave his opinion. The whole subject was extensively presented to him and took the widest range. The interpretation of the treaty stipulations according to the law of nations, and the necessity of construing the laws passed to carry out the provisions of the treaty so as to give them full effect, were strongly urged. A review and reversal of the whole action of the administrative officers was asked.

Mr. Crittenden's reply was comprehensive and elaborate.

Upon the question of the revisory power of the Secretary over the awards of the judges he adhered to the opinion formerly expressed by him and followed by his successors and acted upon by the Secretaries of the Treasury. Upon the question of interest he said he was inclined to the opinion that indemnification, or satisfaction, for property illegally taken or destroyed includes not only its value, but interest upon that value, as an equivalent for the loss of the use of that property. But he added:

"* * * I should probably advise you, in the particular cases now before you, to adopt that measure of compensation, if a different rule in respect to the allowance of interest in the same class of cases had not been so thoroughly and long established in your department as to make it, in my judgment, binding upon you.

* * * * *

"Of the claims provided for by the treaty and by the acts of Congress before mentioned, it appears that, during the last twenty-five or twenty-six years, more than two hundred have been from time to time adjudicated by the Florida judges, and presented at the Treasury Department for revision and payment by the Secretary; that, in the great majority of cases, interest was allowed by those judges in their decrees and awards; and that, in every such instance during that whole period of time, the claim for interest has been decided against and rejected by every Secretary of the Treasury. These Secretaries were by law made special judges in this matter, with final jurisdiction. Their decisions must be presumed to have been made with deliberation, and upon due consideration of the before-mentioned acts of Congress and of the treaty, so far as it was, by reference, made part of them.

"The opinions of several Attorneys-General who were officially called on for their advice, have sanctioned those decisions, without the dissent of any one of them, so far as I am informed.

"Some years ago, Mr. Attorney-General Nelson, in an opinion given by him on this very subject, declared this

question of interest *not open* for discussion. He considered it then as *settled*, by previous decisions and practice, that no interest was to be allowed.

"In that opinion I concur. It has ever since been followed; and, if any number of decisions by your predecessors, with any sanction of time and practice, can establish a ruling precedent, or settle a legal question of construction, such a precedent and construction must be considered as established and settled in this instance. And it seems to me, sir, that the rule of deciding, which has been so often repeated and so firmly established, ought to be regarded by you as a binding authority.

"It results from these views, that the interest which may have been awarded in the decisions of the Florida judges can not be allowed by you, or paid by the Treasury Department, consistently with the *long settled construction* of the acts of Congress applicable to this subject; and that it ought not therefore to be so allowed or paid." (5 Op. 351-353.)

Almost coincident with this opinion by Mr. Crittenden, a case growing out of these claims in east Florida, was decided by the district judge, under the authority of an act of February 22, 1847, providing that the unfinished business pending before the judge of the Superior Court at St. Augustine as a commissioner under the act of 1834, etc., might be transferred to the judge of the District Court of the Northern District of Florida to be proceeded with and finished. In a very able opinion District Judge Bronson held that under the statutes, passed to carry into effect the ninth article of the treaty, the Secretary of the Treasury was limited in his authority to inquire only: Whether the injury in question had been occasioned by the operations of the American army in Florida; whether it had been suffered by a Spanish officer, or individual Spanish inhabitant, or actual Spanish subject; that it had been established by law; that in east Florida, whether it had been committed previous to the entrance into Florida of the agent and troops of the United States in 1812; and that the claim (if for losses of 1812 and 1813) had been filed and presented to the judge within the one year limited in the act.

The authority of the Secretary to supervise or control the decision of the judge was thus denied; he could only inquire into the right of the tribunal to pronounce any award.

This case was promptly appealed to the Supreme Court. The appeal was dismissed for want of jurisdiction. But the court, speaking through Chief Justice Taney, construing the statute, said:

"The law of 1823, therefore, and not the stipulations of the treaty, furnishes the rule for the proceeding of the territorial judges and determines their character. And it is manifest that this power to decide upon the validity of these claims is not conferred on them as a judicial function, to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*; and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award are to be filed in the court in which he presides, nor recorded there; but he is required to transmit both the decision and the evidence upon which he decided to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

* * * * *

"Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right therefore to make the approval of the award by the Secretary of the Treasury. one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him; and his decision against the

claimant for the whole or a part of the claim as allowed by the judge is final and conclusive. * * *” (*United States v. Ferreira*, 13 How. 40, 46, 47.)

The right of these claimants to interest upon the amounts found due for losses was frequently made the subject of appeals to Congress.

Upon a report made by Mr. Ashley, chairman of the Committee on Foreign Affairs of the Senate, on August 3, 1846, one of the petitions of a claimant, with the accompanying documents, was referred to the Secretary of the Treasury and the Attorney-General to report thereon to the Senate.

The Senate declined to take any action until that report was received. On July 22, 1854, Mr. James Guthrie, the then Secretary of the Treasury, in a letter to the President of the Senate, declining to reexamine the decisions of his predecessors, stated that he had determined to take the opinion of the Attorney-General; and he communicated that opinion with a statement of all the claims presented to the Secretary of the Treasury under the provisions of the treaty and the act of 1823 and 1834. He added to the opinion the following note:

“By the tabular statement submitted, the total claims presented for losses in east and west Florida, under the ninth article of the treaty, amounted to \$2,808,703.15. Those in east Florida, under the same article, for the years 1812, 1813, and 1818, were \$2,731,038.93. Those in west Florida, under said article, for 1814, were \$77,664.22.

“The payments made by the Secretaries of the Treasury, for those presented for 1812 and 1813 and 1818, were \$1,199,459.31. The payments made by same, for 1814, were \$25,533.37, and in all, \$1,224,992.68, and there remains in the department not disposed of nine claims for injuries in 1812 and 1813 of \$23,098.76; of these claims, \$1,670, the Secretary of the Treasury authorized to be paid to Redin Blount and \$6,080 to Pass’s administrator, which they decline to receive.

“The computation of interest in the tables presented is made at the rate of 5 per cent, and is carried up to the 20th instant, and makes the aggregate of interest to that date \$1,550,413.”

The opinion of Attorney-General Cushing, June 9, 1854 (6 Op. 533), presents a judicious and thorough examination of the whole subject. He not only declined to reconsider the conclusions of his predecessor, but he cordially assented to them. (See also 16 Op. 200.)

Some of the claimants then, under a peculiar jurisdiction conferred upon the Court of Claims, secured resolutions referring, by the Senate, their cases, together with all papers on file, to that court. These cases were most elaborately argued and finally reported adversely to the claims. They are reported in "Reports of the Court of Claims, vol. 3, 1859-60."

I have thus, in compliance with the broad terms of the request submitted to you, given a careful and comprehensive history of the claims presented by persons for injuries, satisfaction for which was to be made by the United States in compliance with the provisions of the ninth article of the treaty of 1819 with Spain. I have shown, in minute detail, the unvarying attitude of the Secretaries of the Treasury and the unconflicting opinions of successive Attorneys-General. As far as the administrative officers of the Government are concerned there are no open questions. A uniform practice has settled all matters of contention under the treaty and the statutes. It is not to be presumed that any Secretary of the Treasury would, at this day, adopt a different rule as to the payment of the claims.

Under the circumstances, after an extended examination of a vast mass of arguments and reports and decisions, in presenting this "review" for the information of the President, I think I can not, with propriety, express an opinion upon the merits of these claims. It is clear this would carry little weight as an official expression.

The whole subject is, manifestly, for the consideration of Congress. Reports from committees of both the Senate and House of Representatives have been made at various times. No concert of acting, however, by both Houses has ever been had nor any legislation secured.

I have the honor to be, sir,

Very respectfully, your obedient servant,
GEORGE W. WICKERSHAM.

THE PRESIDENT.

PURCHASE OF DEER SKINS IN ALASKA DURING CLOSED SEASON.

The Secretary of Agriculture has no authority to allow a manufacturer in Alaska to purchase deer skins in that Territory during the closed season, for the purpose of manufacturing the skins into gloves and other novelties to be shipped beyond the boundaries of the Territory, notwithstanding the hides are claimed to have been accumulated from the legal kill since the Alaska game law of May 11, 1908 (35 Stat. 102), became operative.

Section 4 of the act of May 11, 1908 (35 Stat. 103), forbids traffic in the hides, skins, or heads of game animals in Alaska at any time during the closed season. This includes purchase as well as sale.

DEPARTMENT OF JUSTICE,

May 18, 1910.

SIR: In your letter of May 9th instant, you state that a glove manufacturer, operating mills at Juneau, Alaska, has made application to you for permission to purchase, "for manufacturing into gloves and other novelties to be shipped beyond the boundaries of the Territory, some 10,000 deer skins, said to be accumulated from the legal kill since the Alaskan game law has been operative," and you request from me an opinion whether the Secretary of Agriculture is authorized to grant such permission.

By section 4 of the act approved May 11, 1908 (35 Stat. 102, 103), "An act to amend an act entitled 'An act for the protection of game in Alaska, and for other purposes,'" it is provided:

"SEC. 4. *Sale.* That it shall be unlawful for any person or persons at any time to sell or offer for sale any hides, skins, or heads of any game animals or game birds in Alaska, or to sell, offer for sale, or purchase, or offer to purchase, any game animals or game birds, or parts thereof, during the time when the killing of such animals or birds is prohibited: *Provided*, That it shall be lawful for dealers having in possession game animals or game birds legally killed during the open season to dispose of the same within fifteen days after the close of said season."

The first clause of this section is clearly directed to the traffic in the hides, skins or heads of game animals and game birds, and forbids that traffic at any time. The

second clause is intended to protect and preserve game by requiring a strict observance of the regulations for the open and closed seasons for killing. These seasons are arbitrarily fixed in the second section. The prohibition is against any purchase or sale of game animals or game birds during the closed season. The proviso permits dealers having these in possession killed during the open season to dispose of the same within fifteen days after the close of that season. These provisions of the statute govern the purchase and sale of the game for consumption as food. This is in uniformity with the exemptions mentioned in the first section of the statute, which says, nothing in the act "shall prevent the killing of any game animal or bird for food or clothing at any time by natives, or by miners or explorers, when in need of food; but the game animals or birds so killed during close season shall not be shipped or sold."

The absolute prohibition in the fourth section applies to the case stated by Mr. Grinnell. It includes the purchase as well as the sale. It forbids the traffic.

The only control the Secretary of Agriculture has under this statute is—

"* * * for the preservation of game animals or birds, to make and publish rules and regulations prohibiting the sale of any game in any locality modifying the close seasons hereinbefore established, providing different close seasons for different parts of Alaska, placing further restrictions and limitations on the killing of such animals or birds in any given locality, or prohibiting killing entirely for a period not exceeding two years in such locality."

Under these provisions, I am of opinion that no authority is given to the Secretary of Agriculture to grant the permission asked for.

Very respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF AGRICULTURE.

REVENUE-CUTTER SERVICE—ENLISTED MEN ARE NOT OFFICERS.

Enlisted men of the Revenue-Cutter Service are not "officers of the Government" within the meaning of the act of March 2, 1907 (34 Stat. 1170), which provides that no part of that appropriation shall be applied to the payment of the expenses of using transports in any other government work than the transportation of the Army and its supplies, and officers and enlisted men, etc., of the Marine Corps, etc.

Enlisted men are never called officers in any branch of the government service except where they are appointed as noncommissioned or petty officers in the Army or Navy. The terms "officers" and "enlisted men" are used in contradistinction, neither referring to the other.

DEPARTMENT OF JUSTICE,

May 21, 1910.

SIR: I have the honor to respond to the request in your note of May 18, 1910, for an opinion whether enlisted men of the Revenue-Cutter Service may properly be considered as "officers of the Government" within the meaning of the act of March 2, 1907 (34 Stat. 1170, 1171), which provides:

" * * * No part of this appropriation shall be applied to the payment of the expenses of using transports in any other government work than the transportation of the Army, its supplies and employees; and when, in the opinion of the Secretary of War, accommodations are available, transportation may be provided for the officers, enlisted men, employees, and supplies of the Navy, the Marine Corps, and for members and employees of the Philippine and Hawaiian governments, officers of the War Department, Members of Congress, other *officers of the Government* while traveling on official business, and without expense to the United States, for the families of those persons herein authorized to be transported, and when accommodations are available, transportation may be provided for general passengers to the Island of Guam, rates and regulations therefor to be prescribed by the Secretary of War. * * * "

I think the question must be answered in the negative.

Except where some enlisted men are appointed as noncommissioned or petty officers in the Army or Navy, enlisted men are never called officers in any branch of the government service. The two terms "officers" and "enlisted

men" are used in contradistinction, neither referring to the other.

This distinction is clearly maintained in the act referred to, and when enlisted men are intended, they are mentioned because they are not supposed to be included in the words "officers."

Thus, provision is made for the transportation of "officers, enlisted men, employees, and supplies of the Navy, the Marine Corps, * * * officers of the War Department, * * *."

As Congress has here provided for some enlisted men, it must be taken that it has done so for all that were intended, and the maxim "*expressio unius est exclusio alterius*" applies, and while they are enlisted men they can not receive the transportation which the act impliedly refuses them by being called "other officers of the Government."

We need not trouble ourselves for the reasons which induced Congress to provide transportation for enlisted men of the Navy and Marine Corps and by its omission of those of the Revenue-Cutter Service to impliedly refuse it to them, as it suffices to say that the law is so written, and your question is answered in the negative.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

UNITED STATES DISTRICT COURT, PORTO RICO—SIGNING
BILL OF EXCEPTIONS.

Where the United States district judge for the District of Porto Rico left the jurisdiction before signing a bill of exceptions, he should return to Porto Rico and sign it; but in case that can not be done, the bill of exceptions should be prepared and agreed upon by counsel on both sides, and counsel should stipulate that it is correct and that the judge may allow and sign the same outside of his district.

DEPARTMENT OF JUSTICE,

May 26, 1910.

SIR: I have the honor to acknowledge receipt of your communication of May 24, 1910, wherein you state the following facts:

A case against the United States was tried some months ago in Porto Rico before Judge Rodey of the United States District Court, and a judgment was rendered therein for about nine thousand dollars, and a motion for a new trial was made and overruled. Judge Rodey is now absent from Porto Rico, and in Washington, D. C., but has issued an order extending the time for settling, signing, and filing the bill of exceptions ninety days. Judge Rodey's term of office will expire June 15, 1910, when he will be succeeded by Judge Jenkins; and you ask my opinion as to by whom and where the bill of exceptions should be settled and signed.

Section 953, Revised Statutes, as adopted in 1874, reads as follows:

"A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto."

In *Malony v. Adsit*, 175 U. S. 281, 284, it appeared that the bill of exceptions was not settled, allowed, and signed by the judge who tried the case, but by his successor in office several months after the trial. It was held that the allowing and signing of the bill of exceptions is a judicial act which can alone be performed by the judge who sat at the trial, and consequently that the bill of exceptions was void.

By the act of June 5, 1900, ch. 717 (31 Stat. 270), section 953, Revised Statutes, was amended so as to read as follows:

"That a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds said trial judge

or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he can not fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor."

It will be observed that this amendment provides that the bill of exceptions may be acted upon and signed by other than the trial judge only in case of "death, sickness, or other disability." In *Western Dredging & Improvement Co. v. Heldmaier*, 111 Fed. 123, the Circuit Court of Appeals of the Seventh Circuit held that this statute did not apply when the trial judge was absent from the circuit, the court holding generally that the term "other disability," as used in the statute, means "a physical or mental disability of like character to death or sickness, by which the trial judge is disabled from the performance of judicial functions."

Inasmuch, therefore, as previous to the passage of the act of June 5, 1900, a bill of exceptions could not be signed by the successor of the trial judge, and as no such condition is prescribed in this act, it follows that Judge Jenkins, as Judge Rodey's successor, will be without authority to sign the bill of exceptions.

As additional authority for this conclusion, see 3 Encyc. Pleading & Practice, page 456, where it is said that:

"The prevailing doctrine in the case of the removal, resignation, or expiration of the term of the trial judge is that the judicial function survives in him for the purpose of authenticating the bill, and he is accordingly the proper person to sign. His successor can not allow the bill, as he is a stranger to the judicial proceedings related therein."

A further question is as to Judge Rodey's power to settle and sign the bill of exceptions outside of Porto Rico.

In *Oliver v. Town*, 24 Wis. 512, and *Ex parte Nelson & Kelly*, 62 Ala. 376, 382, it was held that the trial judge could sign a bill of exceptions when outside his circuit; but these decisions rested on the ground that a state circuit judge is a state official, and had power to try cases outside of his own circuit.

When the case of *Western Dredging & Improvement Co. v. Heldmaier* was before the Circuit Court of Appeals of the Seventh Circuit for the second time (116 Fed. 179, 185), it was held that the fact that the trial judge was absent from the circuit when the time expired for settling and signing the bill of exceptions, and counsel had done all he could to have the same signed, justified the trial judge, at a subsequent term, while sitting again in the district in allowing and signing the bill *nunc pro tunc*, as of the date of the former allowance; and as a reason for this, the court said:

"The bill failed of signature by the trial judge at the term, not through any fault of counsel presenting it. He had done all that he could. The trial judge *was absent from the circuit. It could not be signed by him without the district. His presence was necessary.* The term was at its close. The presence of the judge could not be obtained. The bill was presented in court, and by the court ordered filed."

There is certainly greater reason why the judge of the district court of Porto Rico would not be authorized to act when outside of that district, and in the United States proper, than there is for holding that a district judge can not sign a bill of exceptions outside of the district wherein the trial was had, although in the same circuit. In view of the fact that a district judge has often been called upon to try cases in other districts of the circuit and is a judge possessing general jurisdiction, I seriously doubt the correctness of the proposition laid down by the Court of Appeals of the Seventh Circuit; yet I have found no federal authorities to the contrary. But, however this may be, I am of the opinion that a judge of the district of Porto Rico can perform no judicial functions outside of that district,

because his court is created by special statute, and its jurisdiction is confined, under that statute, to Porto Rico.

It would appear, therefore, that the only safe course to pursue would be for Judge Rodey to return to Porto Rico and sign the bill of exceptions; but in case that can not be done, it should be prepared and agreed upon by counsel on both sides, and counsel should stipulate that it is correct and that Judge Rodey may allow and sign the same outside of his district. Under the liberal practice laid down in *Western Dredging & Improvement Co. v. Heldmaier*, 116 Fed. 179, this would probably be sufficient.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

BOATSWAIN IN NAVY—REVOCATION OF WARRANT.

The President has no power to revoke the warrant of a boatswain in the Navy and discharge him from the service without the sentence of a court-martial.

DEPARTMENT OF JUSTICE,

May 31, 1910.

SIR: I have the honor to acknowledge the receipt of your communication of May 24th instant, in which you request an opinion "as to whether the warrant of Boatswain John Stokes, U. S. Navy, may legally be revoked and Boatswain Stokes discharged from the Navy on account of expiration of enlistment."

Your statement shows that, "on January 31, 1907, while serving as an enlisted man in the Navy, John Stokes was given an acting appointment as a boatswain, and on August 6, 1908, received a permanent appointment as such, his warrant, which bore the latter date, containing the following provision: 'This warrant is to continue in force during the pleasure of the President of the United States.'"

It is now well settled in this country that the power which appoints to office may remove at will, unless restrained by law. In this case of Stokes, he could be removed by the President, who had solely appointed him, unless that

action is prohibited by some statute. It is conceded that the only restraining provisions are contained in section 1229, Revised Statutes, and included in article 36 for the government of the navy, section 1624, Revised Statutes. Those provisions are as follows:

"SEC. 1229. The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for reappointment. And no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.

"Art. 36. No officer shall be dismissed from the naval service except by the order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a court-martial or in mitigation thereof."

In construing section 1229 a distinction is made between officers in the Army and the Navy. It was held in *Hartigan v. United States* (196 U. S. 169) that an army officer means a commissioned officer. This decision was based upon section 1342, Revised Statutes, which provides that the word officer, as used in the rules and Articles of War, article 99 of which is exactly the same as article 38 of naval articles, shall be understood to designate commissioned officers. Hartigan was a cadet at West Point and was summarily dismissed by the President for improper conduct. The distinction is recognized by the court, which said: "It is not necessary to dispute that a cadet is an officer. Whether he is or is not is not the question in the case. The question is, whether section 1229 applies to him, and to so construe it would seemingly give it no application except to cadets (and officers in the naval service)."

The statutory authority to appoint boatswains in the Navy is found in section 1405, which is as follows:

"The President may appoint for the vessels in actual service, as many boatswains, gunners, sailmakers, and carpenters as may, in his opinion, be necessary and proper."

By section 1406 it is provided:

"Boatswains, gunners, carpenters, and sailmakers shall be known and shall be entered upon the Naval Register as 'warrant officers in the naval service of the United States.'"

Boatswains then are officers in the Navy appointed by the President. As was said by the court in *Brown v. United States* (18 Ct. Cl. R. 537, 543):

"'Warrant' and 'commission,' outside of naval technicality are synonymous words. There is no difference, in form, between a commission and a warrant as used in the Navy, except that one recites that the appointment is made 'by and with the advice and consent of the Senate' and the other does not."

There is, however, a class recognized in the Navy who are neither commissioned nor warrant officers, who perform the duties of the station in which they are temporarily placed. They are generally, though not necessarily, styled acting, as acting boatswain, acting gunner, etc., and have an appointment with that title. Temporary appointments are also recognized by section 1410, Revised Statutes, which is as follows:

"SEC. 1410. All officers not holding commissions or warrants, or who are not entitled to them, except such as are temporarily appointed to the duties of a commissioned or warrant officer, and except secretaries and clerks, shall be deemed petty officers, and shall be entitled to obedience, in the execution of their offices, from persons of inferior ratings."

The appointment referred to in this section is confined to "officers not holding commissions or warrants, or who are not entitled to them." The officer receives no commission or warrant. He is simply appointed to the duties of a commissioned or warrant officer.

The determination of the question presented to me depends upon whether Boatswain Stokes is an officer within the meaning of section 1229. He unquestionably is unless his appointment was to perform temporarily the duties of a boatswain or was subject to an authority of revocation by the appointing power. That it was not the former is clearly shown by his own military history. He was first appointed an acting boatswain. Subsequently he was, by

the President, appointed as an officer in the Navy. His warrant as a permanent officer was issued, and he entered upon and performed his duties as such officer.

The tenure of his office is fixed by legislation. After it was thus established was it within the power of the appointing power to limit it as, it is suggested, by the incorporation in the warrant of the provision that it was to continue in force during the pleasure of the President? I think not. The revocation of the warrant effects a dismissal from the office, and, by a reasonable construction of section 1229, a dismissal from service.

I am not advised whether it is the practice now to include this qualification in commissions and warrants in the Navy. Mr. Attorney-General Cushing (8 Op. 231), speaking of the constitutional power of the President to dismiss officers of the Navy without sentence of court-martial, after declaring that, as a question of law, the power had been adjudged to exist, said:

“So it is in the practice of the Government. The power has been exercised in many cases with approbation, express or implied, of the Senate, and without challenge by any legislative act of Congress. And it is expressly reserved in every commission of the officers, both of the Navy and Army.”

But this was long before the enactment embraced in section 1229, which forbids the dismissal except upon sentence of a court-martial. This is a limitation upon the power of removal from office of one who had been legally appointed. I fully agree with what was said by Mr. Solicitor-General Phillips, with the approval of Attorney-General Taft (15 Op. 565):

“This case (of the dismissal of an acting gunner) differs in principle from that where the appointing power intends to appoint to a certain office, but at the same time endeavors to encumber such appointment with illegal qualifications. In such case the qualifications are void.”

Nor do I think this question is affected by the provisions of section 1409. A warrant officer may, before the term of his enlistment has expired, by the sentence of a court-martial, or by resignation of his office, be returned to the

condition of an enlisted man. But there is no statutory authority for the President to relegate to his former inferior position a regularly warranted officer who has been promoted from his place as an enlisted man, for the purpose of discharging him. This is contrary to the spirit, if it is not to the very letter, of the law of section 1229.

While it would be most desirable that authority should be given to the President to revoke the commission or warrant of an officer convicted of an offense and sentenced to imprisonment by a civil court, yet no such exception is found in the law to the sweeping provisions of section 1229. I am therefore constrained to the opinion that, in the case presented to me, there is no power in the President to revoke the warrant of Boatswain Stokes and discharge him from the Navy without the sentence of a court-martial.

Very respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE NAVY.

AWARD FOR DETECTING FRAUDULENT WEIGHING OF
SUGARS.

The Secretary of the Treasury is authorized, under the act of June 22, 1874 (18 Stat. 186), to make an award to Richard Parr for his services in detecting the fraudulent weighing of sugars by the American Sugar Refining Company, and for his seizure of the appliances, used in committing this fraud, and of the cargo of the ship which was discharging at the time of the detection. No other person is entitled to an award in this matter.

The application of secret springs to the mechanism of the government scales by means of which the full weight of a dutiable article was not registered, constituted "smuggling" within the meaning of the statute.

DEPARTMENT OF JUSTICE,

June 3, 1910.

SIR: I have the honor to reply to your letter of April 15, 1910, in which, upon the following statement of facts, you request my opinion whether the law will allow you to make an award to Richard Parr, or to Edwin I. Anderson, or to

330 *Award for Detecting Fraudulent Weighing of Sugars.*

Charles M. Dally, for services in connection with the detection of the fraudulent weighing of sugars by the American Sugar Refining Company at the port of New York.

The case as stated by you is as follows:

"Richard Parr, as is well known, is a claimant for an award by the Secretary of the Treasury for his services in detecting the fraudulent weighing of sugars by the American Sugar Refining Company, and for his seizure of the appliances used in committing this fraud and of the cargo of the *Strathyre*, the ship which was discharging at the time of the detection. There are two other claimants: Edwin I. Anderson and Charles M. Dally.

"The facts as I believe them to be are as follows:

"Parr is a man of intelligence, acumen, courage, and persistence. He was a sugar sampler on the docks in New York from 1899 to 1904. During his term as sampler he came to suspect the existence of the sugar frauds, and became interested and involved in an attempt to ferret them out. He came to Washington in the latter part of this period and communicated his suspicions and impressions to Mr. Loeb, who was then Secretary to the President and who had known Parr as a school friend. He wanted to be made a customs agent, or special employee, as it was then called, in order that he might with better facilities and opportunities pursue his investigations, believing decidedly that he could develop the facts. In connection with his application he stated his suspicions and intentions to the Treasury Department. His permanent appointment as special employee was delayed until 1905, when it was finally made. At that time, however, the Treasury Department, instead of allowing him to begin his work in New York, preferred to send him to Maine to get experience as a customs agent; and there he did very effective work in connection with wool frauds. He was detained in that work until the early part of 1907, when he got the assignment to New York which he had desired. He did not lose sight, while absent, of his purpose in connection with the sugar frauds. After resuming his investigations on his own account at close range in New York for a few months, he communicated with George F. Cross, special agent in

charge at New York, and told him the work he was quietly carrying on in connection with his other official duties; and he was encouraged by Special Agent Cross—who was his chief—to continue his investigations on his lines, but was cautioned to be very careful. This understanding with Special Agent Cross was in July, 1907.

“Parr continued this work more and more uninterruptedly and exclusively until November 20, 1907, when he made the final discovery of the frauds and made the seizures. Meanwhile, September 9, 1907, Dally wrote to the Treasury Department calling attention to information which he had of fraudulent sugar weighing. This led to further correspondence between him and the department and finally to interviews in Washington between the officials of the department, Anderson, Special Agent Cross, and Richard Whalley, who was the source through Anderson of the specific features of Dally’s information. Anderson was at one time an assistant dock superintendent for the American Sugar Refining Company, and claims to have had suspicions at that time. This was in the nineties. Richard Whalley was in the employ of the sugar company in the nineties, and claims that he invented a fraudulent method of weighing sugars—by a set of special weights—which was put in operation in 1898 by the sugar company. When Anderson and Whalley first met does not appear; but probably in September Whalley told Anderson about his weights. Anderson had been intending to sell his story to the newspapers, when Dally advised against that course. Dally then took an interest in the matter with Anderson and laid the case before the Government and subsequently added Whalley’s story. This gives the basis of the claim of Dally and Anderson. Whalley has made no claim against the Government. At one time he gave Dally a power of attorney to act for him with the Government, but subsequently withdrew it. On the 11th of November Special Agent Cross turned over to Parr the correspondence and facts in the Dally-Anderson-Whalley case. He associated with him Special Agent Brzezinski, and also gave him Whalley to act with him, Whalley meanwhile having been put into the service as a special employee by the de-

partment. They were first directed to find whether the device reported by Dally-Anderson-Whalley was the device used in the frauds. It was quickly found that this device was not being used, and this ended the investigation so far as the specific information of Dally-Anderson-Whalley was concerned and seems to have ended the importance of Dally and Anderson's connection with the case. Whalley continued to act with and for Parr, but now only as Parr's assistant in carrying on his own investigations. Brzezinski continued to act with Parr, but evidently the leadership was in Parr. The initiative rested with him and the information and action were meanwhile associated with him. The investigation from this time was pressed very energetically and resulted in the decisive discoveries of the 20th of November. These decisive discoveries are not claimed by anybody but Parr.

"The remaining pertinent facts are that the seizure of the cargo of the *Strathyre* was not formally filed because orders were received from the Treasury Department in Washington to release the vessel which had been seized by Parr, before the papers were, in the ordinary course, completed; and this release was accordingly made. It appears that Parr had proceeded as far and as promptly as he could have been expected to do in the matter of completing the forms, and that the order for release came before he could have been expected to complete all the formalities following the seizure.

"Subsequently Parr interested himself in a most effective way in the legal suits and prosecutions and gained the admiration and the high commendation of the representatives of the Department of Justice and of everybody in the Treasury Department with whom he came in contact. The success of the suits and the prosecutions is largely attributed to his work, continued through many months, he having been detailed to act with the district attorneys. There is also no doubt that he was sought to be bribed with offers of very large amounts of money and that he repulsed these offers in a very high-minded and loyal manner. It is also in evidence that he was dogged by detectives; and his life undoubtedly in many ways was made extremely

strenuous and harrassed and his health most seriously undermined. His fidelity to the Government was undoubtedly very marked and exemplary. He has until the present time been the main reliance of both the Department of Justice and of the Treasury Department in respect to all these sugar frauds.

"There is no doubt, therefore, in my mind, of the meritorious character of Parr's services. His personal merit is even more remarkable. As I look at it there can be no doubt that it would be very fitting to make him an award if the law permits it—and it would be unfortunate if the award could not be made.

"I therefore submit to you the question of whether the law will allow me to make this award. You will, I presume, pass at the same time upon my right to make an award to Dally and Anderson; since, as I understand it, an award made to one person, either as detector and seizor or as an informer, precludes the making of any award in this case to any other person."

The question submitted involves the construction of section 4 of the act of June 22, 1874 (18 Stat. 186), which is as follows:

"That whenever any officer of the customs or other person shall detect and seize goods, wares, or merchandise, in the act of being smuggled, or which have been smuggled, he shall be entitled to such compensation therefor as the Secretary of the Treasury shall award, not exceeding in amount one-half of the net proceeds, if any, resulting from such seizure, after deducting all duties, costs, and charges connected therewith: *Provided*, That for the purposes of this act smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom-house, or submitting them to the officers of the revenue for examination. And whenever any person not an officer of the United States shall furnish to a district attorney, or to any chief officer of the customs, original information concerning any fraud upon the customs revenue,

perpetrated or contemplated, which shall lead to the recovery of any duties withheld, or of any fine, penalty, or forfeiture incurred, whether by importers or their agents, or by any officer or person employed in the customs service, such compensation may, on such recovery, be paid to such person so furnishing information as shall be just and reasonable, not exceeding in any case the sum of five thousand dollars; which compensation shall be paid, under the direction of the Secretary of the Treasury, out of any money appropriated for that purpose."

In connection with this statute should be considered the regulation of your department (Art. 1291, C. R. 1908), which provides that an award shall not be made to an officer of the Government in any case where there is an informer who would be entitled to compensation.

Upon the facts stated, I am of opinion that the statute authorizes you to make an award to Richard Parr, and that there is no informer entitled to compensation within the meaning either of the statute or of the regulation.

The only claimants other than Parr are Anderson and Dally, and they claim only by reason of information which admittedly was given to the Government directly by one Richard Whalley. It would be Whalley, therefore, who would be entitled, if anyone, to award by reason of this information, but in my opinion not even he is so entitled, and it appears that he does not make any claim. Undoubtedly his information was of great value, but the facts set out in your letter clearly show that it was not the original inception of the investigation, but that the subject was already under investigation by Parr, in conference with and by permission of Special Agent Cross, who was his immediate chief. Nor was it the fraud which Parr later discovered that was revealed by Whalley's information, which amounted only to a statement that, some ten years before, Whalley, who was then employed as a weigher by the American Sugar Refining Company, had invented a system of weights by which the government scales were falsified. This was a very specific confirmation of the information already in Parr's hands, but, as stated, it was not the original information leading to the investigation

and the discovery, and it was very remote in time, and it covered—as the event proved—a very different fraudulent device and method from the secret springs which Parr discovered inserted in the mechanism of the scales.

It seems to me clear, therefore, that Parr was the “detector” within the meaning of the statute, and that neither Dally nor Anderson nor Whalley is entitled to award.

It is equally clear that in addition to being “detector” Parr was “seizor” within the requirement of the statute. The release by the Treasury Department of the cargo of the *Strathyre* after Parr has seized it, and before he had had an opportunity to complete the formalities of report of seizure and the forms incident thereto, did not, in my opinion, have the effect of wiping out the actual seizure, which in fact, as your letter states, he had made.

The remaining question is whether the goods so seized were goods which were “in the act of being smuggled” or which had been “smuggled” within the meaning of the special definition of the word “smuggling” contained in the statute. This special definition is as follows:

“*Provided*, That for the purposes of this act, smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom-house, or submitting them to the officers of the revenue for examination.”

The pertinent facts on this point of the present case are that an employee of the sugar company was stationed beside the government weigher and without the knowledge of that weigher tampered, by secret springs, with the mechanism of the scales on and by means of which the examination was being made, in such a way that each truck load of three bags of sugar was registered as weighing some 15 pounds less than the true weight, and the said 15 pounds escaped the payment of the duty.

Were these 15 pounds “passed through the custom-house?” Were they “submitted to the officers of the revenue for examination?” Does the fact that the bags which

contained this concealed amount of sugar were passed through the custom-house preclude the operation of the statute?

On these questions, the language of the definition certainly is not free from ambiguity, and it may be that the statute contemplated only those cases of smuggling which are operated on dark coasts in armed skiffs, evading customs lines completely and requiring peculiar vigilance and bravery on the part of the detector. This view would have some support from the congressional history of the legislation, though that history, also, is somewhat ambiguous. The enactment arose from the fact that the former moiety act (act of March 2, 1867, chap. 188, sec. 1; 14 Stat. 546) had occasioned severe criticism, both from the Treasury Department and from importers, upon the ground that the awards granted were excessive in amount; that they were granted to officers of the customs for acts which it would have been the direct duty of those officers to prevent; and especially that they were allowed upon goods forfeited for undervaluation in invoices or on purely technical grounds, the provision being that the reward might be granted in every case of fine, penalty, or forfeiture, even for instance, where forfeiture was incurred merely by failure to have goods on the ship's manifest. (H. Mis. Doc. No. 264, 1st sess., 43d Cong.) These complaints would equally be met by either construction of the clause under consideration. The report of the Senate Committee on Retrenchment (Cong. Rec., 43d Cong., 1st sess., Vol. 2, pt. 5, p. 4036), and the remarks of certain Senators in debate, appeared to construe the definition of smuggling as providing only for cases in which the customs lines were entirely avoided, as in border smuggling. Senators Boutwell, Thurman, Conkling and Edwards appeared to think that this was the meaning and that the result was undesirable. Senator Thurman proposed to strike out the words "or the package containing the same," in order to avoid the question, but the suggestion was not taken up. Senator Boutwell for the same reason proposed to strike out the words "or submitting them to the officers of the revenue," and this was done, but

the clause was restored by the conference committee—for what reason does not appear. On one occasion Senator Conkling (*Ib.*, p. 4816) strongly stated that the section meant that one might lawfully, so far as that bill went, “smuggle a handful of diamonds in a chest of tea if the chest of tea passes through the custom-house,” to which Senator Sherman, who was in charge of the bill “shook his head.”

The administrative practice of the Treasury Department; however, from the very beginning has taken the other view, treating the language of the definition as disjunctive and holding that the fraudulent attempt to bring in dutiable articles without payment of duty is smuggling within this statute, even though the outside package was declared and submitted to the customs officers.

This administrative interpretation has been long continued and is entitled to very great weight—especially as it had the direct sanction of Secretary Sherman, who in the Senate had charge of the bill and who participated in the debates as to the meaning of the very clause which defines the word “smuggling.” It may be instructive to enumerate some of the awards which Secretary Sherman made under this statute:

To William H. Benjamin and J. Henry Storey, customs inspectors; award for seizure No. 3465, August 30, 1879, of undeclared silks, etc., found in declared trunks. The passenger offered these inspectors a bribe.

To Leroy Schermerhorn and Andrew Kinnis, inspectors; award No. 3561, October 13, 1879, for seizure of dutiable silks, etc., discovered in declared baggage stated to contain “wearing apparel in actual use and personal effects not merchandise.”

To John N. Lanthin, customs inspector; award for seizure No. 2739, September 3, 1878, of feathers, metal ornaments, etc., concealed in false bottoms of declared packages.

To D. S. Bennett and nine other inspectors; award for seizure No. 3419, August 12, 1879, of jewelry, etc., found concealed under false bottom in declared trunk.

The same administrative construction was continued by Secretary Sherman's successors, who made numerous awards in similar instances of concealed or undeclared articles contained in declared packages or in false bottoms thereof. Such awards were made, for example, in the cases arising on the following seizures:

In 1881—seizure Nos. 5083, 5084, 5152, 5158.

In 1900—seizure Nos. 33492, 33837.

In 1902—seizure No. 36424.

In 1903—seizure No. 38425.

In 1904—seizure Nos. 39556, 39609, 38468.

In 1905—seizure Nos. 41365, 41366, 41367.

In 1906—seizure No. 42114.

I understand that very numerous other awards were made until 1906, when the department, for administrative reasons, suspended the practice of making any awards to government officers for any reasons whatever.

This emphatic administrative construction is also in accord with the view of the Court of Claims, in the case of *Eager v. United States* (32 Ct. Cl. 571), in which that court expressed its view that the attempt to bring in valuable silk, woolen, and velvet goods, invoiced and entered as cotton goods, made a case of smuggling within this section, even though the boxes containing the goods were declared and entered and made available to examination.

I do not think that this class of cases is validly to be distinguished from Parr's case. In Parr's case the examination by customs officers was to consist of weighing by scales and it was prevented from being a real examination by the insertion in the scales of a spring which in effect concealed some fifteen pounds of the sugar from the notice of the weigher; just as in the other cases portions of the contents of trunks subject to examination by ocular inspection were sought to be concealed by misdescription or by coverings.

The administrative construction is also supported, to some extent, by the case of *Keck v. United States* (172 U. S. 434, 458), where the Supreme Court stated that this act intended to enlarge, rather than to narrow, the ordinary

meaning of the word "smuggling" in our laws. In that case the court appears to define even the ordinary meaning of the word "smuggling" as not limited to a total avoidance of the customs lines, but as including the fraudulent passing of goods by concealment through those lines.

On the whole, I am of opinion that Senator Sherman's administrative action, continued by his successors and supported by the Court of Claims, should be given the decisive weight, and therefore that you have authority to make an award to Parr. I feel the clearer in this conclusion, because you advise me that it is the conclusion reached by Assistant Secretary Curtis, and by Mr. Henry L. Stimson, who has been my special assistant in direct charge of the cases involving these frauds.

Herewith I return all papers.

Very respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

LEAVES OF ABSENCE—EMPLOYEES OF ARSENALS, ETC.—
CONTINUOUS EMPLOYMENT.

Employees of the navy-yards, gun factories, naval stations, and arsenals of the United States Government, working under continuous employment, are not day laborers or piece workers in the ordinary sense of that term, and are therefore entitled to leaves of absence as provided by the act of February 1, 1901 (31 Stat. 746).

DEPARTMENT OF JUSTICE,

June 10, 1910.

SIR: On September 18, 1909 (27 Op. 613), an opinion was rendered to you by the Solicitor-General, with my approval, in reply to your request for an opinion concerning the operation of the act of Congress approved February 1, 1901, with reference to the leaves of absence of employees of the navy-yards, gun factories, naval stations, and arsenals of the United States Government. In that opinion you were advised:

1. That the general depot of the quartermaster's department at Philadelphia, Pa., was "an arsenal of the

United States Government" within the language of the statute.

2. That the statute did not apply to employees working at a fixed rate of pay per day or per hour or to pieceworkers.

Since that opinion was rendered, very earnest protest has been made to me on behalf of employees of the Philadelphia Arsenal, and it has been suggested that the day laborers or pieceworkers, so called, to whom the principles of the opinion were applied, were in reality laborers under continuous employment, and not day laborers or pieceworkers in the ordinary sense of that term as used in mercantile pursuits, which implies merely casual employment; and at my request you have furnished me with a statement of the terms under which employees in the Ordnance Department and in the office of the Quartermaster-General are employed. I refer particularly to the indorsements and inclosures transmitted to me through you by the Chief of Ordnance, under date of February 24, 1910, and by the Quartermaster-General, under date of March 28, 1910, indicating a complex, and in some respects uncertain, status of those employees to whom by the uniform practice of your department leave of absence seems to have been given pursuant to the act of Congress of February 1, 1901, above referred to. In view of the facts stated, it must be fair to say that employees working under the special terms and under the specially indicated conditions are not to be viewed as mere day laborers or pieceworkers. In your inquiry, to which the opinion of September 18, 1909, above referred to, was a response, no exact showing was made concerning the terms or conditions of any man's employment. On the contrary, the inquiry seemed to necessitate the assumption of the case of an ordinary day laborer and of an ordinary pieceworker, and with reference to such cases no reason is perceived why the opinion should be modified; but the facts now detailed concerning the actual relation of certain classes of employees to the War Department may be deemed to take those employees out of the scope of that opinion. No distinction is perceived between

the employees at the quartermaster's department at Philadelphia—known as the Schuylkill Arsenal—and the other employees referred to in the indorsements of the Chief of Ordnance and the Quartermaster-General above referred to.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF WAR.

BRIDGE ACROSS THE MISSISSIPPI RIVER AT HILL CITY,
MINNESOTA.—CONSTRUCTION.

The act of February 15, 1910 (36 Stat. 193), entitled an act to legalize the construction of a bridge across the Mississippi River at Hill City, Atkin County, Minn., does not require the Secretary of War to approve the bridge as built with possibly such minor changes as might be readily made.

The act above referred to is at most permissive. Congress did not intend to legalize the structure if it did not meet with the approval of the Secretary of War and the Chief of Engineers.

The Secretary of War would be authorized to approve the bridge in question, if, after such alterations as might be readily made therein, it could be fairly held to satisfy the present needs of navigation, leaving the prospective needs of navigation to be dealt with under the general authority conferred upon him by section 4 of the act of March 23, 1906 (34 Stat. 84), to require the alteration of such structures to meet the needs of navigation.

DEPARTMENT OF JUSTICE,

June 15, 1910.

SIR: Under date of the 9th instant, at your direction, the Assistant Secretary of War requested my opinion upon certain questions arising out of the legislation of Congress in respect to a bridge across the Mississippi River at Hill City, Minn.

From the statement of facts accompanying this request it appears that by the act approved May 20, 1908 (35 Stat. 166, 167), the Mississippi, Hill City and Western Railway Company was authorized to construct, maintain, and operate a railroad bridge and approaches thereto across the Mississippi River at a certain point in Aitkin County, Minn., section 2 of that act providing that all of the

bridges thereby authorized should be constructed in accordance with the provisions of the act approved March 23, 1906 (34 Stat. 84). Section 1 of the latter act provides:

"Be it enacted, etc., That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; * * *."

After referring to this legislation, the Assistant Secretary of War states:

"By letter of June 15, 1908, the company applied for approval of the plans and location, but at the time the application was made the bridge was practically completed, so far as the features affecting navigation were concerned, the piers having been built and the grade fixed. It appeared upon investigation that the location of the structure was as bad a one as could have been selected, and that future complaint by navigation interests was not improbable, in view of which the department declined to approve the plans presented and advised the company that if the bridge was completed as planned it would be an illegal structure."

On February 15, 1910, the President approved an act passed by Congress at its present session entitled "An act to legalize the construction of a bridge across the Mississippi River at Hill City, Aitkin County, Minnesota," which provided (36 Stat. 193):

"Be it enacted, etc., That the consent of Congress is hereby granted to the Mississippi, Hill City and Western Railway Company, a corporation of the State of South Dakota, to maintain and operate the bridge and approaches thereto now constructed across the Mississippi River at section four, township fifty-two north, range

twenty-three west, in Aitkin County, in the State of Minnesota, in accordance with the provisions of an act entitled 'An act to regulate the construction of bridges over navigable waters,' approved March twenty-third, nineteen hundred and six: *Provided*, That the said Mississippi, Hill City and Western Railway Company shall, within three months after the passage of this act, file with the Secretary of War their acceptance of this act, together with plans and specifications of the said bridge, and said plans and specifications shall have been approved by the Secretary of War and the Chief of Engineers; otherwise, this act shall be null and void.

"SEC. 2. That the right to alter, amend, or repeal this act is hereby expressly reserved."

In accordance with the proviso to section 1 of the act, the Assistant Secretary of War states "that the company now files its acceptance of the provisions of the act, and submits plans for departmental approval," but adds:

"It appears from the report of the 30th ultimo by the district engineer officer that the bridge as built is decidedly objectionable to navigation interests; and that, while the company has endeavored to remedy some of its obstructive features, little has been accomplished, for the reason that the principal fault is in the location. The district officer is of the opinion that approval should not be given to such a bridge, and protests against favorable action have been filed by navigation interests.

"It will be noted that the act in question is somewhat peculiarly drawn, and considering that the bridge was already built and that Congress was fully advised as to the facts in the case at the time the measure was passed, the Secretary of War is in doubt as to the extent of discretion lodged in the department. Whether it was the intention of Congress that the bridge should be allowed to stand as built, with possibly such minor changes as can readily be made, or to legalize only such a bridge as, in the judgment of the department, will amply satisfy the present and prospective demands of navigation, which would require radical changes and probably entire reconstruction at a different site, is a question not wholly clear."

Upon this statement of facts the following questions have been presented for my determination:

"1. Does the statute require the Secretary of War to approve the bridge as built, with possibly such minor changes as can be readily made; or

"2. Does the act legalize only such a bridge as, in the judgment of the department, will amply satisfy the present and prospective demands of navigation, which would require radical changes and probably reconstruction at a different site; which exercise of authority would probably result in nullifying the law?"

It appears that the original bill (H. R. 11307, 61st Cong., 2d sess.) on this subject provided:

"Be it enacted, etc., That the bridge constructed across the Mississippi River at section 4, township 52 north, range 23 west, being in Aitkin County, in the State of Minnesota, by the Mississippi, Hill City and Western Railway Company be, and the same is hereby, legalized, and the consent of Congress is hereby given to its maintenance by said company: *Provided*, That any changes in the said structure which the Secretary of War may at any time deem necessary, and order in the interest of navigation, shall be promptly made by the owners thereof at their own expense."

This bill was reported from the Committee on Interstate and Foreign Commerce with an amendment striking out all after the enacting clause and adding the provisions which appear in the act as passed. (H. R. Report No. 322, 61st Cong., 2d sess.) This report stated that "the bill as amended has the approval of the War Department, as will appear by the indorsements attached and which are made a part of this report." The indorsements referred to read as follows:

"WAR DEPARTMENT,

"OFFICE OF THE CHIEF OF ENGINEERS,

"Washington, December 18, 1909.

"Respectfully returned to the Secretary of War.

"The construction of the bridge mentioned in the accompanying bill (H. R. 11307, 61st Cong., 1st sess.) was authorized by an act approved May 20, 1908, but the plans

for the structure were not submitted to the Secretary of War for approval, as required by the act, until construction had been commenced and those features that affect navigation had been fixed and practically completed. In consequence of this, and of the further fact that the bridge was badly located, the Secretary of War declined to approve the plans, and the structure is therefore an illegal one.

"The object of the bill now under consideration is to cure this defect and legalize the bridge. Although, on account of its faulty location, the bridge is likely to be the cause of future complaint on the part of navigation interests, I do not see any objection to the passage of the bill, as I am of the opinion that the proviso therein, 'that any changes in the said structure which the Secretary of War may at any time deem necessary, and order in the interests of navigation, shall be promptly made, by the owners thereof at their own expense,' is sufficient to safeguard the interests of the public.

"It is suggested, however, that the usual express provision reserving the right to amend or repeal be added to the bill.

"W. L. MARSHALL,
"Chief of Engineers, U. S. Army.

"WAR DEPARTMENT,
"December 20, 1909.

"Respectfully returned to the chairman Committee on Interstate and Foreign Commerce, House of Representatives, inviting attention to the foregoing report of the Chief of Engineers, U. S. Army.

"ROBERT SHAW OLIVER,
"Acting Secretary of War."

The act of February 15, 1910, refers on its face to "the bridge and approaches thereto now constructed," so that Congress must be presumed, especially in view of the report of the Committee on Interstate and Foreign Commerce, to have been fully aware of the fact that such bridge was an existing structure.

The committee amendment entirely changed the language of the bill as originally introduced, including the proviso,

the amendment providing that the railway company "shall within three months after the passage of this act file with the Secretary of War their acceptance of this act, together with plans and specifications of the said bridge, *and said plans and specifications shall have been approved by the Secretary of War and the Chief of Engineers; otherwise this act shall be null and void.*"

In my judgment the purpose of this proviso was to make the legalization of the bridge depend upon the company's ability to file within three months after the passage of the act plans and specifications of the bridge which would meet with the approval of the Secretary of War and the Chief of Engineers, and the discretion of those officers is, I think, in no wise limited by the fact that the bridge was already constructed.

The legislative history of the act shows that Congress made no inquiry into the question whether the interests of navigation could properly be subordinated to the use of the bridge as already constructed, and the act itself indicates the intention of Congress to leave that question to the usual authorities on such matters—the Secretary of War and the Chief of Engineers.

The only information which Congress can be presumed to have had on this subject is contained in the report of the Committee on Interstate and Foreign Commerce. From that report it appeared that, "although, on account of its faulty construction, the bridge is *likely* to be the cause of *future* complaint on the part of navigation interests," the Chief of Engineers and the Secretary of War were willing that a bill legalizing the bridge should be passed, provided it contained a provision safeguarding the interests of the public. While the committee thought proper to omit such a provision from the amended bill, it nevertheless made the validity of the act depend upon the ability of the company to file plans and specifications of the bridge within three months after the passage of the act which would meet with the approval of the Secretary of War and the Chief of Engineers. For aught that was brought to its attention, it is possible Congress thought the bridge might readily be altered so as to meet with the approval of the Secretary of

War and the Chief of Engineers, or that the officers mentioned might be willing to approve the bridge as it stood, in view of their power, under section 4 of the act of March 23, 1906, to require the alteration of the bridge at some future time if it should prove, in practice, to be an unreasonable obstruction to navigation. In any event, it is clear that Congress did not intend to legalize the structure if it did not meet with their approval.

I can see nothing in the act which justifies the construction that Congress intended to "*require* the Secretary of War to approve the bridge as built, with possibly such minor changes as can be readily made," as suggested in your first question. The most that can be said is that the act is permissive on this subject, and authorizes the Secretary of War and the Chief of Engineers, in the due exercise of their power and discretion, to approve the bridge as built, with such minor changes as could be readily made therein. To hold otherwise would be to say that Congress intended to legalize the bridge although found by the officers referred to to be an unreasonable obstruction to navigation. In view of the established policy of Congress, as illustrated by the act of March 23, 1906, to require the alteration of all bridges across navigable waters of the United States deemed by the Secretary of War and the Chief of Engineers to be unreasonable obstructions to navigation, I do not think it should be held that Congress intended to legalize any bridge which was such an obstruction in the opinion of these officers, unless its purpose so to do appears in clear and unmistakable language. In the present case the language of the act conveys exactly the opposite impression, as it expressly makes the validity of the act dependent upon the approval of the plans and specifications of the bridge by the Secretary of War and the Chief of Engineers.

Referring specifically to your second question, I beg to say that, under all the circumstances of this case, you would be authorized to approve the bridge in question if, after such alterations as might be readily made therein, it could be fairly held to satisfy the present needs of navigation, leaving the prospective needs of navigation to be dealt

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with under the general authority to require the alteration of such structures to meet the needs of navigation given you by the act of March 23, 1906. It will be observed that the act of February 15, 1910, gives the consent of Congress to the maintenance and operation of the bridge and its approaches in accordance with the provisions of the act of March 23, 1906.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

CIVIL SERVICE—EXAMINATION OF TEMPORARY EMPLOYEE
IN CENSUS OFFICE FOR POSITION IN APPORTIONED
SERVICE OF THE GOVERNMENT.

A person employed in the temporary force of the Census Office, in an apportioned position and charged to the quota of his State, is not required by the proviso of section 7 of the act of July 2, 1909 (36 Stat. 3), to return to his State to take an examination for another position in the apportioned service of the Government.

DEPARTMENT OF JUSTICE,

June 17, 1910.

SIR: In accordance with your request of the 11th instant, I have the honor to submit my opinion upon the question presented to you by the Civil Service Commission in their communication of the same date, as to the necessity for a person in the temporary force of the Census Office returning to his State to take an examination for a position in the apportioned service of the Government, in view of the restriction as to the place of examination contained in the first proviso to section 7 of the act approved July 2, 1909 (36 Stat. 1).

Section 6 of that act authorizes the appointment by the Director of the Census of an additional force "during the decennial census period, and no longer." Section 7 provides:

"That the additional clerks and other employees provided for in section six shall be subject to such special test examination as the Director of the Census may prescribe, the said examination to be conducted by the United States Civil Service Commission, the examination to be

open to all applicants without regard to political party affiliations, and such examination shall be held at such places in each State as may be designated by the Civil Service Commission. Copies of the eligible registers so established and the examination papers of all eligibles shall be furnished the Director of the Census by the Civil Service Commission, and selections therefrom shall be made by the Director of the Census, in conformity with the law of apportionment as now provided for the classified service, in the order of rating: *Provided*, That hereafter all examinations of applicants for positions in the government service, from any State or Territory, shall be had in the State or Territory in which such applicant resides, and no person shall be eligible for such examination or appointment unless he or she shall have been actually domiciled in such State or Territory for at least one year previous to such examination: * * *."

It will be observed that the Director of the Census is required by the above section to make selections from the eligible registers "in conformity with the law of apportionment as now provided for the classified service, in the order of rating." In respect to this provision, the Civil Service Commission states:

"The Department of Commerce and Labor, with the concurrence of the Commission, construed this language as not requiring the Bureau of the Census to take into consideration the present status of the apportionment of other government employees in making selections under the law of apportionment for the temporary census service. The result is that the apportionment of the additional census force is separate and distinct from the apportionment of other appointments in the departments at Washington, D. C."

After calling attention to the fact that in my opinion of November 15, 1909 (28 Op. 78), it was held that the first proviso to section 7 had reference only to the apportioned service of the Government, the commission says:

"In harmony with this opinion and the apparent purpose of the restrictions, it is the Commission's view that these restrictions do not apply to a person who is already in an apportioned position and charged to the quota of

his State and who desires to enter an open competitive examination for appointment to another position in such service. This seems to the Commission the reasonable view, because the application of the domicile restrictions to such a case would not seem to serve any purpose; such a person being already charged to the quota of his State, if he should receive a new appointment in the apportioned service as a result of the second examination, a duplicate charge, as a matter of course, would not be made to his State."

The question now presented is thus stated by the Commission:

"Mrs. Blanche M. Sell is now serving in the census force as a result of being examined in Minnesota and charged to the quota of that State under the apportionment of that force. Mrs. Sell has applied for admission to an open competitive examination for the position of botanical artist in the Department of Agriculture; that is to say, for a position under the apportionment but under the apportionment separate from that for the census force. Under the ruling and practice of the Commission as hereinbefore indicated, the domicile restrictions of the first proviso of section 7 of the census act would not be applied to a person applying for this examination if such person were already charged to the quota of his State under the same apportionment in which this position is included. On the other hand, all persons in nonapportioned positions in Washington desiring to enter open competitive examinations for positions in the apportioned service are required to return to the States of their residence for the purpose of taking the examinations.

"The question upon which the opinion of the Attorney-General is desired is:

"Upon the facts stated and under the provisions of the statute may Mrs. Sell, a resident of Minnesota, take the open competitive examination for the position of botanical artist in the Department of Agriculture, elsewhere than in the State of Minnesota?"

Notwithstanding the fact that there are two separate and distinct rules of apportionment—one for certain ap-

pointments in the departments at Washington generally, with the exception of the temporary census force, and one for such force—it seems to me that there is no more reason for requiring a person in the temporary census force to return to his State for the purpose of taking an examination for a position in the regular apportioned service than there is for requiring a person already in such service to do so. It is true that if, as a result of such examination, he should enter the regular apportioned service, the number of appointments therein accredited to his State would be increased. But there can be no objection on the part of any State to receiving its full quota of appointments, provided the persons accredited thereto are bona fide residents thereof. The manifest purpose of the restrictions as to place of examination and domicile contained in the first proviso to section 7 of the census act is to safeguard the rights of the States and Territories in the apportionment of government offices, and what occurred in Congress in connection with the insertion of this proviso in that section confirms this view (28 Op. 83). In other words, such proviso was intended to prevent other than actual residents of a State from being accredited thereto in the matter of appointment to government office. But persons in the temporary census force had to comply with the requirements of that proviso in order to be appointed. Such being the case, their status as legal residents of the States to which they are accredited is necessarily determined for apportionment purposes while they hold office under the Government. Certainly, it could not be held that because of their absence from their respective States during their term of office they have not been domiciled therein as required by the proviso in question. To require them to return to their States to take another examination would therefore have no significance whatever in determining their actual residence for the purpose of apportionment.

In my judgment, it is a fair reading of the proviso in question to say that it is applicable only to those seeking to obtain positions in the apportioned service of the Government, whether the apportionment is general or special, and has no application to those already in an apportioned serv-

ice. Persons in unapportioned positions in Washington desiring to enter open competitive examinations for positions in the apportioned service are properly required to return to the States in which they claim residence for the purpose of taking such examinations, because in being appointed to the unapportioned service the question of their residence was not important, and they were not required to meet the tests imposed by Congress in respect to applicants for positions in the apportioned service.

I have not overlooked the fact that the last proviso to section 7 provides that upon the termination of the services of the temporary census force the officers and employees therein "shall not be eligible to appointment or transfer into the classified service of the Government by virtue of their examination or appointment under this act." But Mrs. Sell is not seeking to be appointed or transferred into the classified service by virtue of her examination or appointment under the census act. She must take a new examination and receive a new appointment. The only question is where she shall take it. To require her to return to Minnesota for the purpose, when she might take it here, is utterly useless, from the standpoint of the purpose of the law, since her status as a legal resident of Minnesota is settled.

Respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

NAVAL OFFICERS—RANK AND PAY OF CAPTAIN JEFFERSON F. MOSER.

In the case of a retired naval officer who served as midshipman at the Naval Academy during the civil war and who secured a judgment in the Court of Claims in which it was held that he was entitled to "three-fourths of the sea pay of the next higher grade" above that held by him at the time of retirement under the act of March 3, 1899 (30 Stat. 1007), wherein it appears that the Court failed to take into consideration the act of June 29, 1906 (34 Stat. 554), of similar import—such judgment does not estop the Secretary of War from contesting the officer's claim to be retired with the rank of the next higher grade under the provisions of the latter statute.

In a second suit between two parties, where the cause of action is similar to the cause of action in the first suit, the parties are not precluded from contesting the constitutionality or the existence and force of a statute which was not alluded to or brought to the attention of the court in the former suit.

DEPARTMENT OF JUSTICE,

June 20, 1910.

SIR: I have the honor to acknowledge the receipt of your letter of May 27 ultimo in reference to the rank and pay of Capt. Jefferson F. Moser, United States Navy.

Captain Moser was placed on the retired list with the rank he then held on September 29, 1904, on his own application after forty years' service. If he had served during the civil war within the meaning of section 11 of the personnel act of March 3, 1899 (30 Stat. 1007), he was entitled when retired to "be retired with the rank and three-fourths of the sea pay of the next higher grade." On September 29, 1864, he was appointed a midshipman at the Naval Academy, and was there continuously until after the close of the civil war. The Navy Department held that his service as a student at the academy was not service during the civil war; and that therefore he was not entitled to increased rank under the personnel act. But in a suit brought by Captain Moser for salary of the increased rank, the Court of Claims decided that "service as a midshipman at the Naval Academy from the date of his appointment thereto until the close of the rebellion was service 'during the civil war,' within the intent and meaning of section 11 of said Navy personnel act, and he was therefore entitled to have been retired with the rank and three-fourths of the sea pay of the next higher grade." (42 Ct. Cl. 86.)

At the time of this judgment there was in existence another law, the act approved June 29, 1906, which had not been considered in the case. That law provided (34 Stat. 554):

"That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is borne on the official

register of the Navy, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service or on account of age, or after forty-years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: *Provided*, That this act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special act of Congress."

The question presented to me is whether this judgment is under the circumstances *res judicata* as to the right of Captain Moser to be retired with the rank of the next higher grade; in other words, whether the Government is precluded from contesting his claim to that rank on the ground that he is not entitled to it on account of the provisions of the act of 1906.

That the judgment in the case decided upon the merits is a bar to all further litigation of the same demand is indisputable. All controversy upon that is closed. Its validity can not be contested, no matter what might have been said at the trial for or against it. But it is conclusive only upon such matters as were litigated and determined in the action. Parties are not estopped by a judgment in one cause of action from disputing in another cause of action the doctrines of law applied to the first. (Bigelow, Estoppel, 100.)

Cromwell v. County of Sac (94 U. S. 351); *Davis v. Brown* (94 U. S. 423); *Dennison v. United States* (168 U. S. 241); *Bernard v. Hoboken* (3 Dutch. 412); *Wentworth v. Racine Co.* (99 Wis. 26); *Nesbit v. Riverside Independent District, &c.* (144 U. S. 610, 620); *Virginia-Carolina Chemical Co. v. Kirven* (215 U. S. 252).

And so, in a suit between the same parties, upon another although similar cause of action, the parties are not precluded from contesting the constitutionality or existence and force of a statute which was not alluded to or brought to the attention of the court in the former suit.

Boyd v. Alabama (94 U. S. 645); *South Ottawa v. Perkins* (ib. 260); *Philadelphia v. Ridge Ave. Railway Co.* (142 Pa. St. 484); *Dobbins et al. v. First National Bank of Peoria* (112 Ill. 553, 561).

The record, as to what issues were contested and what was decided, in the case in which Captain Moser obtained judgment is clear. The claim was that he was entitled to the "three-fourths of the sea pay of the next higher grade" under the provisions of the naval personnel act. Judgment was given to him for pay upon that basis. There was no contest as to the law of 1906.

It is true the exact question decided by the Court of Claims in the case of Captain Moser is not presented in a later case brought upon a similar cause of action. What was decided was that the officer was entitled to pay for a certain specified time. Admitting that the rank and pay are correlative, and that the right to one is the same as the right to the other, I am asked whether the Secretary of the Navy is estopped, by the judgment heretofore rendered, from refusing to place Captain Moser's name "in the Navy Register in the list of officers in the Navy retired with the rank of rear-admiral." For the reasons above given I answer that question in the negative.

Very respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

STATUE OF ROBERT E. LEE, CLOTHED IN CONFEDERATE UNIFORM, FOR STATUARY HALL, NATIONAL CAPITOL.

No objection can be legally made under existing law to the placing in Statuary Hall of the National Capitol, by the State of Virginia, of a statue of Robert E. Lee, clothed in confederate uniform.

DEPARTMENT OF JUSTICE,

July 8, 1910.

SIR: I have read the resolutions adopted by the Department of New York, Grand Army of the Republic, at Syracuse on June 23, and the communications of Hon. James Tanner with respect to them. The act of July 2,

1864, referred to (13 Stat. 347), provides for the erection of suitable structures and railings in the old Hall of the House of Representatives for the reception and protection of statuary, which is to be under the supervision and direction of the Chief of Engineers in charge of public buildings and grounds, and the statute authorizes the President—

“to invite each and all the States to provide and furnish statues, in marble or bronze, not exceeding two in number for each State, of deceased persons who have been citizens thereof, and illustrious for their historic renown or from distinguished civic or military services, such as each State shall determine to be worthy of this national commemoration; and when so furnished, the same shall be placed in the old Hall of the House of Representatives, in the Capitol of the United States, which is hereby set apart, or so much thereof as may be necessary, as a National Statuary Hall for the purposes herein indicated.”

It is probably true that when this act was passed Congress did not contemplate that any State would designate one or more of its citizens who were then engaged in war-like rebellion against the Government of the United States as persons “illustrious for their historic renown or from distinguished civic or military services” whose statues should be placed in this Hall. Nevertheless, perhaps in the hope that what Mr. Lincoln so fittingly described as “this scourge of war” might soon pass away, and that a reunited country might be realized, Congress placed no limitation in the act upon the exercise of the discretion of any State in selecting those persons whom it “may deem to be worthy of this national commemoration.” It is now forty-five years since the civil war was closed. Robert E. Lee has come to be generally regarded as typifying not only all that was best in the cause to which, at the behest of his native State, he gave his services, but also the most loyal and un murmuring acceptance of the complete overthrow of that cause. That the State of Virginia should designate him as one illustrious for distinguished military services is therefore natural; that his statue should be

clothed in the confederate uniform, thus eloquently testifying to the fact that a magnanimous country has completely forgiven an unsuccessful effort to destroy the Union, and that that statue should be accepted in the National Statuary Hall as the symbol of the acceptance without misgivings of a complete surrender and a renewed loyalty, should surely provoke no opposition. But at all events, independently of the question of taste, the act of Congress places no restriction upon the designation by the States of those whom they may desire to honor in this way, nor does it vest in any official any censorship concerning the design of the costume in which a statue shall be depicted.

The act establishing a Commission of Fine Arts, approved May 17, 1910, authorizes the appointment of a permanent Commission of Fine Arts, whose duty it shall be to advise, among other things—

“upon the selection of models for statues, fountains, and monuments erected under the authority of the United States and upon the selection of artists for the execution of the same,”

but the provisions of this act, it is declared,—

“shall not apply to the Capitol building of the United States and the building of the Library of Congress.”

Therefore, under the existing law, I am of opinion that no objection can be lawfully made to the placing in Statuary Hall of the National Capitol of a statue of Robert E. Lee clothed in the confederate uniform.

I return the correspondence with Mr. Tanner which you transmitted to me.

Very respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

EIGHT-HOUR LAW—CONSTRUCTION OF NAVAL VESSELS.

The provision of the naval appropriation act of June 24, 1910 (36 Stat. 628), which makes the act of August 1, 1892 (27 Stat. 340), known as the eight-hour law, applicable to the construction of naval vessels, should be construed to apply simply to work done on the vessel itself at the place where it is built and not to the manufacture elsewhere of machinery or other material which is to enter into the construction of the vessel.

DEPARTMENT OF JUSTICE,
July 8, 1910.

SIR: Under date of the 30th ultimo you called my attention to the following provision in the naval appropriation act approved June 24, 1910, relating to the hours of service of laborers and mechanics employed in the construction of certain vessels authorized by that act, viz:

"And the contract for the construction of said vessels shall contain a provision requiring said vessels to be built in accordance with the provisions of an act entitled 'An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia,' approved August first, eighteen hundred and ninety-two, * * *."

In regard to this provision you say:

"Vessels under construction by contract for the Navy have heretofore not been regarded as public works of the United States within the meaning of the acts of August 13, 1894, and February 24, 1905, for the protection of laborers and material men, and consequently laborers and mechanics employed by the builders of such vessels have not been regarded as covered by the eight-hour law of August 1, 1892, herein mentioned.

"The effect intended by the provision quoted above from the naval appropriation act is, it is assumed, to place contracts and contractors for naval vessels in the category with contracts and contractors for public works of the Government usually so regarded. This department foresees great difficulties, if indeed not insurmountable obstacles, to be encountered if, in interpreting said provision in the naval act, all subcontractors for furnishing labor and

materials for such vessels are included within its scope, and is in doubt as to whether the provision to be inserted in the contracts should limit the application of the eight-hour law to the shipyards of the builders or should extend such application so as to cover laborers and mechanics employed in the production of any and all of the numerous parts, materials, machinery, and appliances to be furnished under contract or subcontract for incorporation in the vessels.

"When proposals are invited for the construction of the vessels in question, it will be desirable to acquaint prospective bidders with this department's interpretation of the provision of law quoted above, as their estimates and prices will be materially affected thereby."

You therefore request my opinion as to whether the following clause, drafted for incorporation in the contract for the construction of said vessels, conforms to and fulfills the requirements of said act, viz:

"As required by the naval appropriation act of June twenty-fourth, nineteen hundred and ten, said vessels shall be built in accordance with the provisions of an act entitled 'An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia,' approved August first, eighteen hundred and ninety-two. This requirement is construed by the Secretary of the Navy to mean that the eight-hour law of August first, eighteen hundred and ninety-two, shall apply to laborers and mechanics employed at the works of the party of the first part and at the works of such company as may be awarded subcontract for the construction of the machinery of said vessel as an entity. It is to be understood, however, that this construction of the law is not conclusive, as questions arising under the act may at any time be taken by parties interested to a court for determination."

The first section of the act of August 1, 1892 (27 Stat. 340), provides:

"*Be it enacted*, etc., That the service and employment of all laborers and mechanics who are now or may hereafter

be employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency."

Section 2 of the act provides a penalty for violation by an officer or contractor, and section 3 excepts from the operation of the act contracts entered into prior to its passage.

In an opinion rendered by Solicitor-General Hoyt August 3, 1906, and approved by Attorney-General Moody, (26 Op. 30) it was held that this statute did not apply to vessels under construction for the Navy by contract with builders at private establishments.

The provision of the naval appropriation act in question was inserted by way of amendment when that bill was before the House. In response to the suggestion that the bill was new legislation and subject to a point of order, Mr. Fitzgerald, who offered the amendment, said (45 Cong. Rec. 4440):

"* * * This amendment proposes to compel the building of the vessels authorized in this bill in accordance with the provisions of the eight-hour law. This is the first time we have had an opportunity to get the question squarely before the committee. Under the eight-hour law, the act to which the amendment refers, it is provided that eight hours shall constitute a day's work upon all public works in the United States. By a very extraordinary opinion of the Attorney-General it has been held that a war vessel is not a public work. The only question here, in my opinion, is whether this amendment is germane. The paragraph provides for certain require-

ments in the contracts and for certain conditions under which the vessels shall be constructed. The proposed amendment to the paragraph simply adds to the requirements that the bill proposes to impose upon the contracts and upon those who have control of the construction."

The point of order having been overruled, Mr. Fitzgerald said (*ib.* 4441):

"Mr. Chairman, the effect of this amendment, if adopted, will be to require all contracts for the construction of vessels which are authorized in this bill to contain a provision that the vessels shall be built in accordance with the eight-hour law. I wish to say that I believe the eight-hour law should apply to these contracts. Since I have been a Member of this House, some eleven years, repeated efforts have been made to enact a law making an eight-hour day the legal day for all work done for the Government under contract. Such a bill has never come before the House for action. Five or six years ago the Committee on Labor adopted a resolution directing the Department of Commerce and Labor to make an investigation and ascertain what the effect of an eight-hour day had been in certain work in comparison with similar work done in plants operated for nine hours each day. An exhaustive examination was made of conditions in the navy-yard at Brooklyn, N. Y., and in the Newport News Shipbuilding Company's plant.

"The report made by the department showed that in the construction of the *Connecticut* at the navy-yard at New York the mechanics turned out 24 per cent more work in an eight-hour day than the mechanics at the Newport News shipbuilding yard turned out in nine hours. If the eight-hour law were applied to these contracts not only would the men be benefited, but the navy-yards would then be put upon a fair basis in competition with private plants."

As, under the provision in question, the contract for the construction of the vessels referred to must contain a provision requiring said vessels to be built in accordance with the provision of the act of August 1, 1892, we must necessa-

rily look to the interpretation which has been given that act to determine the scope of the present provision.

In an opinion rendered August 24, 1892 (20 Op. 454), Attorney-General Miller held that the act of August 1, 1892, did not apply to a contract for supplying post-office lock boxes, lock drawers, locks, pulls, plates, etc., to be delivered by the contractors at the freight depot at the point of destination and placed in position in the building by the Government. He said (p. 455):

"From your statement of facts, it does not appear that the persons who furnish the lock boxes, lock drawers, etc., are to do any work upon the public buildings. So far as appears, they simply contract to deliver to the Government, at the freight depot at the various points of destination, the goods in question. In other words, their contract is a contract for the furnishing of materials to be used in public buildings, and not for the service and employment of laborers or mechanics to be employed upon such buildings. To hold that in purchasing materials to be used in the erection and fitting up of public buildings the requirement that such materials shall only have been manufactured by persons working eight hours a day would render this law impossible of execution. If the law is applicable to the goods you name, it is not seen why it would not be equally applicable to a purchase of spikes, nails, lumber, brick, etc., entering into the construction of government buildings."

This opinion of Mr. Miller was expressly approved and affirmed in the opinion of Mr. Hoyt of August 3, 1906, above cited, and again approved by Mr. Hoyt in an opinion rendered by him as Acting Attorney-General on August 4, 1906 (26 Op. 36), in which it was held that the act of August 1, 1892, did not apply to contractors furnishing the Quartermaster's Department with supplies.

A like construction has been placed upon the following statute of the State of New York (Laws of N. Y. 1906, chap. 506, sec. 3, p. 1395), which is similar to that under consideration:

"* * * Each contract to which the State or a municipal corporation is a party which may involve the

employment of laborers, workmen or mechanics shall contain a stipulation that no laborer, workman or mechanic in the employ of the contractor, subcontractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract shall be permitted or required to work more than eight hours in any one calendar day except in cases of extraordinary emergency caused by fire, flood or danger to life or property. * * *

In *Bohnen v. Metz* (126 N. Y. App. Div. 807) a contract had been made with the city of New York for the erection of a municipal building, the contractor agreeing that he would comply with the provisions of the above statute. In the course of construction, doors, windows, and other woodwork required for the building were manufactured for the purpose at the request of the contractor by a manufacturer in the city, who employed his workmen and mechanics for more than eight hours a day and paid them less than the prevailing rate of wages, which was also inhibited by the statute. In holding that the contractor had not violated the law, the court said (p. 810):

"Assuming that the present law is free from the vices of the former law pointed out in *People ex rel. Cossey v. Grout* (179 N. Y. 417), and *People v. Orange County Road Const. Co.* (175 *id.* 84) and kindred cases, it can not be held that the legislature intended to include labor employed in the production of raw material necessary for municipal buildings and works. Presumptively, the legislature enacts labor laws to benefit and aid labor. If the law be held to embrace purchased manufactured material and to work a forfeiture of the contract and all payments earned if in its manufacture and preparation for use the eight-hour law is not observed and the prevailing rate of wages of the locality is not paid, its presumed beneficent object will be defeated, for no municipal work will be done because no contractor will be foolhardy enough to enter into any contract liable to be annulled in such a manner. Labor laws, like any other law which the legislature sees fit to enact, should be upheld by the courts where no constitutional violation exists, but no absurd interpretation which defeats their object should be permitted.

“The situation is not changed because the defendant Wille contracted that he would forfeit payments if he violated the law. The material which he purchased did not come within the law as we view it, because the persons employed in the manufacture of the doors, windows and woodwork ultimately used in the building were not employed ‘on, about, or upon such public work’ within the meaning of the statute, and hence it was unimportant whether they were employed more than eight hours a day or were not paid the prevailing rate of wages.”

In *Ellis v. United States* (206 U. S. 246) the Supreme Court sustained the constitutionality of the act of August 1, 1892, but held that persons employed on bridges and scows, in dredging a channel in a harbor, “were not laborers or mechanics and were not employed upon any of the public works of the United States within the meaning of the act” (p. 260). In that case the court said (p. 258):

“Both of the phrases to be construed admit a broad enough interpretation to cover these cases, but the question is whether that interpretation is reasonable, and, in a penal statute, fair. Certainly they may be read in a narrower sense with at least equal ease. The statute says, ‘laborers and mechanics * * * employed * * * upon any of the public works.’ It does not say, and no one supposes it to mean, ‘any public work.’ The words ‘upon’ and ‘any of the’ and the plural ‘works’ import that the objects of labor referred to have some kind of permanent existence and structural unity, and are severally capable of being regarded as complete wholes.”

In the light of these authorities, I think it clear that the provision in the naval appropriation act must be construed to apply simply to work done upon the vessel itself at the place where it is built, and not as applying to the manufacture of machinery or other material elsewhere which is to enter into the construction of the vessel. This would limit the provision to work upon the vessel at the shipyard, as seems to have been contemplated by Representative Fitzgerald. So construed, the provision would not apply to “the construction of the machinery of said vessel as an

entity," as provided in the proposed clause drafted by your department, assuming that such machinery would be constructed separate and apart from the vessel, but it would apply to the installation of such machinery in the vessel. The restrictions of the eight-hour law could no more be held to apply to the construction of the machinery as an entity, separate and apart from the vessel, than to the construction of any other thing separate and apart therefrom which is subsequently to be incorporated into the vessel—as, for instance, a dynamo or wireless-telegraph plant. Either the law applies to the manufacture of everything that is to form a part of the vessel or it applies only to work done upon the vessel at its situs. The great inconvenience, if not impossibility, of enforcing the law under the former view is manifest. If intended to regulate the hours of service of laborers and mechanics employed in the manufacture of everything which enters into the construction of a vessel, the law would reach out in innumerable directions and interfere with the working of every factory or shop which was furnishing material for the vessel. On the other hand, by construing the law to apply only to work done upon the vessel at its situs, its enforcement becomes a simple matter. While the argument *ab inconvenienti* is not very persuasive, still it is a rule of statutory construction that mischievous and absurd results should be avoided; and when, as here, we find that the statute to be applied has already received a construction which avoids such results, all doubt on the subject is removed.

I suggest, therefore, that you simply incorporate into the contract the provision required by the statute, and direct the bidder's attention to this opinion for the purpose of advising him as to your understanding of the scope of that provision.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

NOTE.—Informal opinion of July 9, 1910, by Solicitor-General Bowers, at that time Acting Attorney-General, to the Secretary of the Navy, printed on pages 531-534.

POTOMAC RIVER, DISTRICT OF COLUMBIA—TITLE TO MADE LAND—RIPARIAN RIGHTS.

The United States is the owner of the submerged land and also the bed of the navigable portion of Potomac River within the original limits of the District of Columbia.

The submerged area along the water front of the Potomac River just below Alexandria, Va., if filled with material dredged from the river, will remain the property of the United States up to the present high-water mark.

DEPARTMENT OF JUSTICE,
July 12, 1910.

SIR: I have received your indorsement of July 6, 1910, asking my opinion as to whether in deepening the channel of the Potomac River along the water front just below the city of Alexandria, Va., the material dredged, if deposited below high-water mark upon certain submerged land, will be the property of the United States or belong to the riparian owners of the land abutting on said high-water mark. The submerged land to which you refer is within a shallow cove within the limits of the District of Columbia.

The boundary called for in the charter to the Lord Proprietary of Maryland is from—

“The first fountain of the river Potomac, thence verging towards the south unto the further bank of the said river, and following the same on the west and south unto a certain place called Cinquack, situate near the mouth of the said river.” (Charter of Maryland, s. 3.)

“to the full extent of this call for the right bank of the Potomac, Maryland has always held; and under that holding, all the islands in the river have been granted by patents issuing from the Land Office or under legislative enactments, or titles derived from this State. * * * Hence, I feel perfectly satisfied * * * that the whole of the river, to its right bank, forms a part of the territory of the State of Maryland.” (*Binney's case*, Bland's Chancery Reports, vol. 2, p. 127; *United States v. Great Falls Manufacturing Company*, 21 Maryland, 127.)

On March 28, 1785, the States of Virginia and Maryland entered into a compact in relation to the Potomac River,

which establishes its character as a navigable river and highway common to both States, but said compact is confined exclusively to matters of jurisdiction and navigation and leaves the rights of the parties untouched. (See resolution 22, Maryland house of delegates, 1785.)

The title of the United States to the premises under consideration rests upon the cession made by the legislature of the State of Maryland, December 23, 1788, entitled "An act to cede to Congress a district ten miles square in this State," which was accepted by the act of Congress approved July 16, 1790, and the act of March 3, 1791, amendatory thereof, and was subsequently reratified by an act of the State of Maryland passed December 19, 1791.

By this legislation the United States became vested with a title to the beds of the navigable waters within the limits of the territory ceded, embracing the Potomac River, which title is held by the United States (as it was previously held by the State) in trust for public purposes.

From the case of *Morris v. United States* (174 U. S. 196) the following quotations are taken from the opinion of the court:

"It is sufficient, for our present purpose, to say that the grant to Lord Baltimore, in unmistakable terms, includes the Potomac River" (p. 223).

"For, even if the latter be the correct view, we agree with the conclusion of the court below that, upon all the evidence, the charter granted to Lord Baltimore by Charles I, in 1632, of the territory known as the Province of Maryland, embraced the Potomac River and the soil under it, and the islands therein to high-water mark on the southern or Virginia shore; that the territory and title thus granted to Lord Baltimore, his heirs and assigns, were never divested by any valid proceedings prior to the Revolution, nor was such grant affected by the subsequent grant to Lord Culpeper" (p. 225).

"Finally, the controversy as to the true boundary still continuing, in 1874, the legislatures of the two States agreed in the selection of arbitrators, by whose award, dated January 16, A. D. 1877, the jurisdictional line and boundary

were declared to be the low-water mark on the Virginia shore. This award was accepted by the two States, and, by an act approved March 3, 1879 (c. 196, 20 Stat. 481), Congress gave its consent to the agreement and award, but provided that nothing therein contained should be construed to impair or in any manner affect any right of jurisdiction of the United States in and over the islands and waters which form the subject of the said agreement or award" (p. 224).

The United States being the owner of the submerged land and also the bed of the river, its soil dredged up from the bottom thereof to deepen the channel in the aid of commerce and navigation, and by artificial means carried and deposited upon its submerged land, can not be treated as an addition to or belonging to the land of a riparian owner whose property adjoins said submerged lands of the United States. If any of the soil thus transferred should become attached to the edge of the land of another, it could not be claimed as accretions, for the law contemplates that accretions are "by the gradual and imperceptible formation of land * * * by alluvial deposits" (*Jefferis v. East Omaha Land Company*, 134 U. S. 178), which rule does not apply in "the case of sudden, perceptible changes, and such changes * * * affect no change in the ownership of any particular portion of the soil." (*St. Louis v. Rutz*, 138 U. S. 226.)

Answering your question, I am of opinion that when the submerged area has been filled in with material dredged from the Potomac River it will remain the property of the United States up to the present high-water mark.

I return all of the papers which accompanied your indorsement of July 6, 1910, herewith.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

MEAT INSPECTION—MEAT FOOD PRODUCT—LARD SUBSTITUTE.

The inspection authorized under the meat-inspection provisions of the act of June 30, 1906 (34 Stat. 674), does not apply alone to establishments in which both the slaughtering of the animal and the preparation of the meat food products are carried on, but to all establishments in which any of the processes required, from the slaughtering to the finishing of the meat food product, is conducted.

The term "similar establishments," as used in the meat-inspection law, was intended to include all establishments which are not specifically mentioned, in which the animal is slaughtered, or the carcass or meat is prepared, or in which the meat food product is manufactured.

Whether or not lard substitute and the establishments where the same is manufactured are subject to inspection under the meat-inspection law depends upon the determination whether lard substitute is a "meat food product."

The language of the meat-inspection law indicates that the term "meat food product" does not merely embrace a food which consists wholly of the meat of an animal.

The determination of the meaning of the term "meat food product" is essential to the proper enforcement of the meat-inspection law, and as Congress has not defined the term, and it has no well-defined meaning, but is one of commercial usage, such determination is not a question of law upon which the Attorney-General may express an opinion, but is a question of fact.

Congress having vested in the Secretary of Agriculture the power to make such rules and regulations as may be necessary for the efficient execution of the provisions of the meat-inspection law, the power to determine what manufactures are "meat food products" rests in the Secretary of Agriculture, subject to the restriction that the definition of the term adopted be not clearly and unquestionably outside the intent of the act.

The definition of a "meat food product" as given by the Secretary of Agriculture in Regulation 3, section 8, is valid.

DEPARTMENT OF JUSTICE,

July 22, 1910.

SIR: I have the honor to acknowledge receipt of your communication of the 15th instant, in which you ask my opinion upon certain questions arising under the meat inspection provisions of the act of June 30, 1906 (34 Stat. 674).

The facts upon which these questions arise are as follows:

There are certain companies who are manufacturers of a lard substitute which is composed of cotton-seed oil

and oleo stearin. Oleo stearin is the commercial name for beef fat, carefully rendered and pressed to extract the oil, which is known as oleo oil, and is the solid residuum after extracting this oil, and of itself is never used for food of any kind. The oleo oil is extracted under heavy hydraulic pressure, leaving the oleo stearin an extremely hard, compact mass, and this is the condition in which it reaches the manufacturing establishments in question. This substance is again melted at a high and sterilizing temperature, and after being blended with cotton-seed oil is subjected to a refrigerating process. The compound thus made consists of 80 per cent cotton-seed oil and 20 per cent oleo stearin, and enters into commerce and is sold and used as a lard substitute.

The questions which you propound are:

First. Is this lard substitute subject to inspection and marking under said meat inspection act.

Second. Is the Secretary of Agriculture empowered to determine and fix, by regulation, whether this lard substitute is a meat food product.

The manufacturers insist that under the terms of the meat inspection statute, neither the plant wherein this product is manufactured, nor the product itself, is subject to inspection; and it is true that if the statute, taken as a whole, must be so construed as not to include these plants and the products thereof, then any regulation made by the Secretary of Agriculture which does include them would be unauthorized and void, notwithstanding the last clause of the nineteenth paragraph of the act, which provides:

“And said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this act.”

This provision does not, of course, undertake to authorize the Secretary of Agriculture to exercise any powers

which are not, by express language or by implication, vested in him by the terms of the statute.

To properly understand the scope of the act, as bearing upon the questions presented, it is necessary to consider a number of its provisions together, as some ambiguity exists in the language of one or more of the paragraphs when considered alone. The purpose of the statute, as stated in the first clause of the meat inspection provisions, has a very important bearing. The object is there declared to be the prevention of—

“the use in interstate or foreign commerce, as hereinafter provided, of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food;”

and this object should be kept steadily in mind in determining to what plants and what food products the act was intended to apply.

In the first paragraph, it is provided that:

“The Secretary of Agriculture, at his discretion, may cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine, and goats before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment, in which they are to be slaughtered and the meat and meat food products thereof are to be used in interstate or foreign commerce.”

Clearly, the last clause is out of position, and it should, with a slightly different wording, be inserted after the word “goats,” making it read:

“The Secretary of Agriculture * * * may cause to be made * * * an examination and inspection of all cattle, sheep, swine, and goats, *the meat and meat food products of which are to be used in interstate or foreign commerce*, before they shall be allowed to enter, etc.”

The second paragraph provides that the Secretary of Agriculture—

“shall cause to be made by inspectors appointed for that purpose, as hereinafter provided, a post-mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, and goats to be prepared for human

consumption at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in any State, Territory, or the District of Columbia for transportation or sale as articles of interstate or foreign commerce;" and the third paragraph was inserted for the purpose of making clearer the scope of the second paragraph, and reads as follows:

"The foregoing provisions shall apply to all carcasses or parts of carcasses of cattle, sheep, swine, and goats, or the meat or meat products thereof which may be brought into any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, and such examination and inspection shall be had before the said carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be treated and prepared for meat-food products; and the foregoing provisions shall also apply to all such products which, after having been issued from any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, shall be returned to the same or to any similar establishment where such inspection is maintained."

The fourth paragraph provides that the Secretary of Agriculture shall cause to be made—

"an examination and inspection of all meat-food products prepared for interstate or foreign commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment;"

and declares that the inspectors shall have access at all times, both day and night, to such establishments, whether in operation or not.

The fifth paragraph provides that all cans, pots, tins, canvas, or other receptacles or coverings in which the inspected meat or meat food products are placed, shall be labeled "Inspected and passed," and declares that no inspection of meats and meat food products deposited or inclosed in such receptacles—

"shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector."

The sixth paragraph provides that the Secretary of Agriculture—

“shall cause to be made, by experts in sanitation or by other competent inspectors, such inspection of all slaughtering, meat-canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and the meat and meat food products thereof are prepared for interstate and foreign commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and to prescribe the rules and regulations of sanitation under which such establishments shall be maintained;”

and that where such premises shall not be kept in proper sanitary condition, he shall refuse to allow the meat or meat food products to be labeled.

The nineteenth paragraph provides:

“That the Secretary of Agriculture shall appoint from time to time inspectors to make examination and inspection of all cattle, sheep, swine, and goats, the inspection of which is hereby provided for, and of all carcasses and parts thereof, and of all meats and meat food products thereof, and of the sanitary conditions of all establishments in which such meat and meat food products hereinbefore described are prepared;”

and further specifies the duties of the inspectors with reference to labeling the carcasses and the meat food products derived therefrom.

The twenty-first paragraph provides:

“That the provisions of this act requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported as interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products supplying their customers;”

but declares it a criminal offense to knowingly sell or offer for sale or transportation in interstate or foreign commerce any meat or meat food products which are diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human food; and authorizes the Secretary of Agriculture

to maintain the inspection provided for in the act at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, notwithstanding the persons operating the same be retail butchers or dealers or farmers; and provides that where the Secretary of Agriculture shall establish such inspection the provisions of the act shall apply.

It will thus be seen that the provisions follow each other in a logical sequence. The first relates to the animal before it enters the slaughtering establishment; the second to the carcass, after the animal has been slaughtered; the third defines the scope of the second paragraph by declaring explicitly to what carcasses and products thereof it shall apply. The fourth applies to all meat food products after they have been prepared from the carcasses; the fifth declares that such products shall be subject to inspection until after they are sealed and inclosed in the receptacle; the sixth provides for the inspection of the premises upon which the slaughtering, etc., is done, and the carcasses handled and prepared, or the meat food products manufactured; and the nineteenth makes clearer the meaning of the preceding paragraphs by prescribing the duties of the inspectors, and particularly pointing out what animals and carcasses thereof and products therefrom and what premises shall be subject to their inspection.

The manufacturers of this lard substitute insist that their establishments are not subject to inspection, because the oleo stearin used by them is manufactured and inspected elsewhere, and they have nothing to do with the slaughtering of the animal or the cleaning and preparation of its carcass.

Section 6, if read alone, gives some countenance to the theory that only an establishment in which both the slaughtering of the animal and the meat and meat food products therefrom are prepared is subject to inspection. The language there used is that the Secretary—
“shall cause to be made * * * inspection of all slaughtering, meat-canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine,

and goats are slaughtered *and* the meat and meat food products thereof are prepared for interstate and foreign commerce."

But, when considered with the remainder of the act, it is apparent that no such narrow construction was intended to be given to this language; and that it is equivalent to saying that the Secretary shall have inspected—

"all slaughtering, meat-canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, and goats are slaughtered and (*establishments in which*) the meat and meat food products thereof are prepared."

No other meaning is consistent with the third paragraph, which expressly provides that the inspection shall apply to all carcasses, meat or meat products which, *after having been issued from any of the establishments mentioned*, "shall be returned to the same or to any similar establishment where such inspection is maintained," thus showing that the inspection was not intended to be confined to buildings in which both the slaughtering of the animal and the preparation of the meat food products were carried on.

A like intent is shown by the provisions of paragraph 19, which declares it to be the duty of the inspectors to make examination of all the animals of the kinds mentioned, and of all carcasses and parts thereof, and of all meats and meat food products thereof, "*and of the sanitary conditions of all establishments in which such meat and meat food products hereinbefore described are prepared.*"

Clearly, therefore, it was intended by the act that all animals which are to be slaughtered in an establishment of the kinds mentioned, and all carcasses and products of the carcasses thereof, and all meat food products manufactured from such carcasses, and all establishments in which *any* of the processes required, from the slaughtering to the finishing of the meat or meat food product, is carried on, should be subject to inspection.

It is next insisted by these manufacturers that their establishments do not fall within either of the terms "slaughtering, meat-canning, salting, packing, rendering, or similar establishments," and it must be conceded that

if included at all it is under the general term "similar establishments."

They attempt to apply in construing this oft-repeated phrase the principle of *ejusdem generis*, and insist, in effect, that the general expression has no meaning whatever, and can include no establishment which can not be considered as belonging to one of the classes particularly named.

The last case in which consideration to this question was given by the Supreme Court is that of *United States v. Mescall* (215 U. S. 26, 31), in which it was insisted by the defendant that a statute which provides a penalty against "any owner, importer, consignee, agent, or other person" who shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, etc., should be restricted in its application to the persons who were concerned in the importation, and that the words "other person" did not embrace a government weigher in the customs service. The Supreme Court, however, held to the contrary, and in its opinion quoted with approval the following from *National Bank of Commerce v. Ripley* (161 Missouri, 126, 132):

"But this (the principle of *ejusdem generis*) is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument * * *. Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the *genus* there is nothing *ejusdem generis* left, and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose."

However, the expression here used, "similar establishments," is more narrow than the words "other person"

used in the statute considered in the *Mescall* case; and the character of every establishment subject to inspection must be *similar* to those which are mentioned in express terms; but the holding of the court in that case that a general phrase following special designations must be given some meaning is here in point. Moreover, it is clear from the repeated use of this expression that Congress did not intend that it should be taken as entirely meaningless; and when considered in connection with the purposes and requirements of the act, and the duties imposed upon the inspectors, it can not be doubted that it was intended to include all establishments which are not specifically mentioned, in which the animal is slaughtered or the carcass or meat is prepared, or in which the meat food product is manufactured.

Consequently, whether or not this act applies to the lard substitute in question and to the establishments of these manufacturers, depends after all upon the meaning of the words "meat food product." If this term is applicable to this lard substitute, then such lard substitute and also the establishments in which it is manufactured are subject to inspection under the provisions of the act.

If this term has such a well-defined meaning that a court will take judicial knowledge thereof, or if it is so clearly defined in the act as to render its meaning not doubtful, then whether or not the lard substitute is subject to inspection is a question of law; but if the meaning thereof must be determined by commercial usage, then it presents a question of fact which will not be passed upon by this department.

An examination of authorities fails to disclose any case wherein an attempt has been made to define what a "meat food product" is, or, in fact, the meaning of the word "product" when used in a similar connection; and while the provisions of the act indicate that it is not to be construed in a restricted sense, yet it is not there defined with any degree of accuracy.

That there is a distinction between the terms "meat product" and "meat food product" is clearly shown in the

third paragraph of the act, wherein it is provided that the preceding provisions shall apply to—

“all carcasses or parts of carcasses of cattle, sheep, swine, and goats, or the meat or *meat products* thereof which may be brought into any slaughtering * * * establishment, etc.;

and, further, that before the carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be “treated and prepared for *meat food products*,” an examination and inspection shall be had; thus showing that “*meat food products*” are manufactures of meat or “*meat products*.”

I think it is not warranted as a matter of law to hold that the term “meat food product” is intended to embrace nothing but a food which consists wholly of the meat of the animal. The language just referred to indicates to the contrary, and such an interpretation would greatly restrict the beneficial effects of the act.

Since, therefore, Congress has not seen proper to define the meaning of this expression, and since its definition is essential to a proper enforcement of the act, and Congress has expressly vested in the Secretary of Agriculture the power to make such rules and regulations as may be necessary for the efficient execution of the provisions of the act, the power to determine what manufactures are “meat food products” rests in the Secretary of Agriculture, such power being restricted, of course, to the adoption of a reasonable definition of the term, and not a definition that would be clearly and unquestionably outside the intent of the act.

This power of the Secretary is upheld by numerous authorities, one of the later cases being *Bates & Guild Co. v. Payne* (194 U. S. 106, 109), where the question was whether the Postmaster-General had the power to decide whether a musical publication was a monthly magazine or whether each issue was complete within itself; and the court, after a review of the authorities, summarized the rule as follows:

“That where the decision of questions of fact is committed by Congress to the judgment and discretion of the

head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

The application of this rule in a case presenting a similar question to the one here under consideration, was made by the Circuit Court of Appeals of the Sixth Circuit in *Coopersville Cooperative Creamery Co. v. Lemon* (163 Fed. 145, 147), Mr. Justice Lurton (then circuit judge) delivering the opinion of the court. It was there held that the Secretary of the Treasury had a right to determine that butter containing 16 per cent of moisture was adulterated butter under the terms of the act there construed, the court saying:

"That the delegation of authority to add to or take from a law would be to delegate legislative power must also be conceded. But that Congress may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear. (Citing numerous authorities.)

"The authority to make all needful regulations not inconsistent with the law is not a delegation of power to add something to an incomplete law nor a grant of judicial power. It is only an authority to determine the fact upon which the operation of the law is made to depend."

In view of these authorities, I am constrained to hold that the definition of a meat food product, as given by the Secretary of Agriculture in Regulation 3, section 8, to wit:

"A meat food product, within the meaning of the meat-inspection act and of these regulations, is considered to be any article of food intended for human use which is derived or prepared in whole or in part from any edible portion of the carcass of cattle, sheep, swine, or goats, if the said edible portion so used is a considerable and definite portion of the finished food,"

is a valid one, and that it is a question of fact for the Secretary to determine whether or not the lard substitute in question is a meat food product within the meaning of this regulation, and whether it and the establishments in which it is manufactured are subject to inspection.

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I will not, therefore, undertake to pass upon the first question propounded by you, and answer the second in the affirmative.

Respectfully,

J. A. FOWLER,
Acting Attorney-General.

The SECRETARY OF AGRICULTURE.

PURCHASE OF SUPPLIES FOR THE EXECUTIVE DEPARTMENTS—BUREAU OF ENGRAVING AND PRINTING.

Detached bureaus or offices having a field or outlying service may, by permission of the head of the department, under section 4 of the act of June 17, 1910 (36 Stat. 531), order all their supplies directly from the contractor, whether needed for use in the city of Washington or elsewhere.

The word "him" in the last proviso of the above section refers to the Secretary of the Treasury, and the word "so" refers to the method of contracting for other supplies, which method is to be followed in contracting for telephone, electric light and power service.

Section 4 of the act of June 17, 1910 (36 Stat. 531), supersedes the acts of January 27, 1894, and April 21, 1894 (28 Stat. 33 and 62), and prescribes the method by which the supplies mentioned therein should be purchased.

The Bureau of Engraving and Printing is subject to the provisions of section 4 of the act of 1894, and supplies for that bureau, of the character mentioned in that act, must be contracted for and purchased in accordance with its terms.

DEPARTMENT OF JUSTICE,
July 25, 1910.

SIR: I have the honor to acknowledge receipt of your communication of June 29, 1910, in which you ask the opinion of this department with reference to certain provisions of section 4 of the act of June 17, 1910, making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1911 (36 Stat. 531).

Said section reads as follows:

"That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other government establishments in Washington, when the public exigencies do not require the immediate

delivery of the article, shall be advertised and contracted for by the Secretary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be a general supply committee in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committee shall be to make, under the direction of the said Secretary, an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties, and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may see fit to call upon, who shall render whatever assistance they may require. The committee shall aid said Secretary in securing the proper fulfillment of the contracts for such supplies, for which purpose the said Secretary shall prescribe, and all departments comply with, rules providing for such examination and tests of the articles received as may be necessary for such purpose; in making additions to the said schedule; in opening and considering the bids, and shall perform such other similar duties as he may assign to them: *Provided*, That the articles intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments; but the said Secretary shall have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased. In all cases only one bond for the proper performance of each contract shall be required, notwithstanding that supplies for more than one department or government establishment are included in such contract. Every purchase or drawing of such supplies from the contractor shall be immediately reported to said committee. No disbursing officer shall be a member of such committee. No department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase

directly from the contractor with the permission of the head of their department: *And provided further*, That telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him."

You ask:

First. In the case of a "detached bureau or office having field or outlying service," such, for example, as the Marine-Hospital Service or the Revenue-Cutter Service, which requires supplies for use both in the city of Washington and at various places throughout the country, may all the supplies required by such bureau, those to be used in the city of Washington, as well as those to be used elsewhere, be ordered directly by such bureau from the person having the contract to supply all of the departments?

Second. To whom does the word "him" in the last proviso in the section refer, and what is the meaning of this proviso?

Third. Is section 3709, Revised Statutes, as amended by acts of January 27, 1894, and April 21, 1894 (28 Stat. 33 and 62), in so far as they provide that the Bureau of Engraving and Printing is excepted therefrom, repealed by this act by implication?

I will reply to the inquiries in the order given.

First. May a detached bureau or office having a field or outlying service order all of its supplies directly from the parties who have contracted to furnish them?

The general provision is that each department and establishment shall draw its supplies through one office or bureau; but the bureaus and offices mentioned constitute an exception to this general provision, which exception depends upon one condition—that the bureau or office have a field or outlying service. If it has such service, it may, by permission of the head of the department, be excluded *entirely* from the general rule, there being no suggestion in the statute of a limitation or restriction as to the amount or character of supplies to be ordered or the point of their delivery.

Therefore, my answer to the first question is that the head of a department may permit any of its bureaus or

offices having a field or outlying service to order all of their supplies, those needed for use in the city of Washington, as well as elsewhere, directly from the contractor.

Second. What is the meaning of the final proviso which relates to telephone, electric light, and power service?

The last word "him" necessarily refers to the Secretary of the Treasury. He is the only single individual mentioned in the entire section, except where it is declared that the supply committee shall be composed of an officer from each department "designated by the head thereof;" and it is apparent that "him" can have no reference to the head of a department as such. The proviso, therefore, is that the Secretary of the Treasury shall "so" obtain telephone and electric light and power service purchased or contracted for from companies or individuals; and the word "so" can refer to nothing else than the method of contracting for other supplies, which is set forth in the preceding parts of the section; and when such services are contracted for they must be ordered as other supplies.

The purpose of this provision was to concentrate in the hands of one individual the power to contract for the services mentioned for all of the departments and establishments, so that uniformity and the most advantageous rates could be secured.

Third. Is the Bureau of Engraving and Printing subject to the provisions of said section 4 of the act of June 17, 1910?

Section 3709, Revised Statutes, provided that all purchases and contracts for supplies in any of the departments of the Government, except for personal services, should be made by advertising, except in case of a public exigency. By the act of January 27, 1894 (28 Stat. 33, ch. 22), this section was amended by providing that the advertisements should all be made upon the same day, and specifying particularly as to the opening of the bids and their submission to a board created by the act, and the recommendation of proposals by this board; and the departments and establishments to which this amendment was applicable were enumerated therein, and paper and materials for the use of the Government Printing Office and materials used in the

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work of the Bureau of Engraving and Printing were expressly excluded therefrom.

By section 2 of the act of April 21, 1894, ch. 61 (28 Stat. 62), the act of January 27, 1894, was amended by limiting its application to "advertisements for proposals for fuel, ice, stationery, and other miscellaneous supplies to be purchased at Washington for the use of the executive departments and other government establishments therein named." This left section 3709, Revised Statutes, in force as to all kinds of supplies not mentioned in this act.

With the law in this condition, the section under consideration was passed, which, in its opening sentence, is made to apply to "*all* supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and government establishments in Washington." This act was intended to, and did, supersede the acts of April 21 and January 27, 1894, and prescribes the method by which the supplies mentioned should thereafter be purchased, and the Bureau of Engraving and Printing, not being excepted therefrom, the supplies of the character mentioned in the act for that bureau must be contracted for and purchased in accordance with its terms.

Very respectfully,

J. A. FOWLER,
Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

PURCHASE OF SUPPLIES FROM PARTY TO AN UNLAWFUL TRUST.

An adjudication that a person or corporation is a party to an unlawful trust or monopoly, from which decree an appeal has been taken, is not sufficient to exclude such person or corporation from competition in the sale of supplies to the Government. Opinion of April 19, 1910 (28 Op. 247), followed.

Statutory authority "to reject any and all bids" does not confer the right to arbitrarily or capriciously reject any bid.

A statutory provision that supplies shall be purchased where they can be cheapest, etc., "the interests of the Government considered," does not enlarge the authority of the contracting officer, but has reference to the cost and adaptability of the supplies.

DEPARTMENT OF JUSTICE,

July 25, 1910.

SIR: I have the honor to acknowledge receipt of your communication of June 14, 1910, in which you state the following facts:

On December 11, 1909, a War Department order was issued by you directed to all officers and agents of the Government in and under the War Department, stating that the Standard Oil Company of New Jersey, and other companies, specifying them, had been adjudged parties to an unlawful trust, and that they were by said order brought within the scope of directions heretofore given, that—

“No contract on behalf of the Government be entered into directly with any corporation which has been adjudicated to be a party to an unlawful trust and monopoly and to be carrying on business in violation of law, nor with any middleman or agent of any such company or concern, where it is known that such middleman or agent is acting for such unlawful concern.”

On May 31, 1910, the Vacuum Oil Company, one of the companies specified in said order, requested the suspension of the above-mentioned order pending the ultimate decree of the Supreme Court, basing the request upon the act of March 3, 1901, describing the method of purchasing supplies for the army, and an opinion of the Attorney-General thereon, which appears in volume 18, Op. 349; and

You request my opinion as to whether or not the adjudication that a person or corporation is a party to an unlawful trust or monopoly and is carrying on business in violation of law is sufficient to exclude such person or corporation from competition in the sale of supplies to the Government.

The following appear to be the statutes which have a material bearing upon the question propounded:

Section 3709, Revised Statutes, provides:

“All purchases and contracts for supplies or services, in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient

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time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

By the act approved July 5, 1884, ch. 217 (23 Stat. 107, 109), it is provided:

"All purchases of regular and miscellaneous supplies for the army furnished by the Quartermaster's Department and by the Commissary Department for immediate use shall be made by the officers of such department, under direction of the Secretary of War, at the places nearest the points where they are needed, the conditions of cost and quality being equal: *Provided also*, That all purchases of said supplies, except in cases of emergency, which must be at once reported to the Secretary of War for his approval, shall be made by contract after public notice of not less than ten days for small amounts for immediate use, and of not less than from thirty to sixty days whenever, in the opinion of the Secretary of War, the circumstances of the case and conditions of the service shall warrant such extension of time. The award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids."

By the act of March 2, 1901, ch. 803 (31 Stat. 905), it is provided:

"That hereafter, except in cases of emergency or where it is impracticable to secure competition, the purchase of all supplies for the use of the various departments, and posts of the army and of the branches of the army service shall only be made after advertisement, and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered; but every open-market emergency purchase made in the manner common among

business men which exceeds in amount two hundred dollars shall be reported for approval to the Secretary of War under such regulations as he may prescribe."

These provisions were subsequently reenacted in the following statutes:

Act of January 30, 1902, ch. 1328 (32 Stat. 514); act of March 2, 1903 (*ib.* 936); act of April 23, 1904, ch. 1485 (33 Stat. 268).

By the act of April 10, 1878, ch. 58 (20 Stat. 36), as amended by the act of March 3, 1883, ch. 120 (22 Stat. 487), it was provided:

"That the Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department. * * * And he may require every bid to be accompanied by a written guarantee, signed by one or more responsible persons, to the effect that he or they undertake that the bidder, if his bid is accepted, will, at such time as may be prescribed by the Secretary of War or the officer authorized to make a contract in the premises, give bond, with good and sufficient sureties, to furnish the supplies proposed or to perform the service required. If after the acceptance of a bid and a notification thereof to the bidder he fails within the time prescribed by the Secretary of War or other duly authorized officer to enter into a contract and furnish a bond with good and sufficient security for the proper fulfillment of its terms, the Secretary or other authorized officer shall proceed to contract with some other person to furnish the supplies or perform the service required, and shall forthwith cause the difference between the amount specified by the bidder in default in the proposal and the amount for which he may have contracted with another party to furnish the supplies or perform the service for the whole period of the proposal to be charged up against the bidder and his guarantor or guarantors, and the sum may be immediately recovered by the United States for the use of the War Department in an action of debt against either or all of such persons."

In compliance with these statutory enactments, the Army Regulations (June 1, 1908) prescribed, among others:

"Par. 547. Except in rare cases, where the United States elects to exercise the right to reject proposals, awards will be made to the lowest responsible bidder whose proposal for furnishing a proper article is not unreasonable.

"Par. 548. Slight failures on the part of a bidder to comply strictly with the terms of an advertisement should not necessarily lead to the rejection of his bid, but the interests of the Government will be fully considered in making the award."

In considering the matters referred to in your communication, I deem it unnecessary to refer to the acts of Congress regulating purchases for specific purposes; as those amendatory of section 3709, especially the act of June 17, 1910, chapter 213; and those providing for the purchase of horses and medical supplies and printing for the War Department. Nor do I deem it necessary to refer to the statutes regulating the manner of purchases in the other departments of the Government. They are all to the same intent and in furtherance of the same policy.

As was said by Mr. Attorney-General Berrien (2 Op. 259), speaking of a like statute:

"Congress intended * * * to throw additional guards around this subject; to prevent favoritism, and to give to the United States the benefit of competition between those who were disposed to render the services or furnish the supplies which the Government might require."

These statutory provisions provide a uniform system for the purchase of supplies. They embrace all the requirements to secure that object. They contemplate the advertising for proposals, definite and specific proposals by competitive bidders, a fair and impartial opening and comparison of the bids, and an award by competent authority. The award must be "to the lowest responsible bidder." This responsibility is not confined to pecuniary responsibility. A discretionary power, to a certain extent, must be reposed in the authorized officer to judge of the

quality and utility of the article or service offered. The statute says, "for the best and most suitable article."

It is also provided that the right is reserved "to reject any and all bids." This authority can only be exercised in conformity with the obligations imposed by the statute. It is not a right to arbitrarily or capriciously reject any bid. If the bid is excessive, if the bidder is not a responsible person, as if for instance he had previously been in default on other contracts, the right to reject exists. And so, in the statutes of 1901, and those following, providing that the purchase of supplies "shall only be made after advertisement, and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered," the phrase, "the interests of the Government considered," does not enlarge the authority of the contracting officer, but has reference to the cost and adaptability of the supplies for the uses of the Government. Indeed, a literal construction would confine it to the cost of the articles.

The system is defined and restricted by the terms of the statutes. The exceptions to the mode prescribed are only where an emergency exists arising from a public exigency or a shortness of time. To impose other restrictions upon this procedure of purchase or the qualification of bidders or the manner of award, would be to import into the act authorities which can only be established by legislative act, and are therefore beyond the office of departmental regulation.

The authority to make rules and regulations conferred by the act of 1878 (*supra*), is to make such administrative regulations as are necessary to carry out the existing law. The right is not given to amend or enlarge the law. To restrict bidders to a certain class, or to exclude a certain class from the right to bid, is not within the provisions of any existing law. If Congress could delegate this power, it certainly has not done so by the statutes herein cited.

The view here expressed is in accord with the conclusion reached by the Attorney-General in an opinion which he

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transmitted to you on April 19, 1910. The question there considered arose under a joint resolution passed by Congress on June 25, 1906, which provided that the purchase of material and equipment for use in the construction of the Panama Canal should be restricted to articles of domestic production and manufacture, from the *lowest responsible bidder*, unless the President should in any case deem the bids or tenders thereof to be extortionate or unreasonable; and the Executive Order of January 6, 1908, applying to the Isthmian Canal Commission, which contained the following provision:

"Contracts for the purchase of supplies, involving an estimated expenditure exceeding \$10,000, shall be made only after the public advertisement in newspapers of general circulation, and shall be awarded to the lowest responsible bidder, except in case of emergency, when with the approval of the Secretary of War, advertising may be dispensed with.

"In the making of contracts for supplies or construction involving an estimated expenditure of more than \$1,000 and less than \$10,000, competitive bids shall be secured by invitation or advertisement whenever practicable."

The question was whether under this resolution and executive order, you could disregard a bid because offered by a company which had been adjudicated to be a party to a combination in restraint of trade in violation of the Sherman antitrust act, and the Attorney-General held that a company which had been adjudged to be a party to such combination was not, for that reason, irresponsible, and that therefore such fact could not be considered in determining whether the bid should be accepted or rejected.

The question there presented is identical in principle with the one now propounded by you, and I think the opinion then expressed by the Attorney-General is conclusive of the present question.

As I understand, the Vacuum Oil Company has not been finally adjudged to be a party to a combination in restraint of trade, but that from the decree which was

rendered to that effect an appeal was taken, and the case is still pending on this appeal. It is not, therefore, necessary to express an opinion upon what the status of the company would be if a final decree affirming the adjudication of the court below were rendered, and in defiance of such decree the company persisted in the transaction of business.

Respectfully,

J. A. FOWLER,
Acting Attorney-General.

THE SECRETARY OF WAR.

RAISING OF THE BATTLE SHIP MAINE AND INTERMENT OF
THE BODIES FOUND THEREIN.

The acts of May 9, 1910, and June 25, 1910 (36 Stat. 353, 789), making appropriations for raising the battle ship *Maine* and the interment of the bodies found therein, contemplated the actual raising of the vessel and the interment of the bodies, and not the mere preliminary preparation for that work.

The provision in the act of June 25, 1910, making an appropriation for raising the battle ship *Maine* is not invalidated by erroneously reciting that the act of May 9, 1910, was approved May 10, 1910.

DEPARTMENT OF JUSTICE,
July 26, 1910.

SIR: I have the honor to acknowledge receipt of your communication of July 15, 1910, in which you ask for a construction of the act of May 9, 1910, relating to the raising of the United States battle ship *Maine* and the interment of the bodies therein, and of the provision of the deficiency appropriation act approved June 25, 1910, relating to the same subject.

The said act of May 9, 1910 (36 Stat. 353), reads as follows:

"That the Secretary of War and the Chief of Engineers are hereby authorized and directed to provide with all convenient speed for the raising or the removal of the wreck of the United States battle ship *Maine* from the harbor of Habana, Cuba, and for the proper interment of the bodies therein, in Arlington Cemetery; and the

Secretary of War is authorized and directed to remove the mast of the wreck of said battle ship *Maine* and place the same upon a proper foundation in Arlington National Cemetery at or near the spot where the bodies of those who died through such wreck are interred: *Provided, however,* That the consent in proper form of the Republic of Cuba shall be first obtained. The sum of one hundred thousand dollars is hereby appropriated, out of any money in the Treasury not otherwise appropriated, on account of the work herein authorized."

The said provision in the deficiency bill, which appears under "War Department, miscellaneous objects" (36 Stat. 789), reads as follows:

"Wreck of battle ship *Maine*: For additional amount for the raising or the removal of the wreck of the battle ship *Maine* from the harbor of Habana in accordance with the provisions of the act approved May tenth, nineteen hundred and ten, two hundred thousand dollars."

In view of the fact that the Chief of Engineers, in answer to an inquiry from the Secretary of War, had, prior to the passage of the act of May 9, reported that it would require not less than \$500,000 to accomplish the object mentioned in said act, you inquire whether said act merely provides for preparatory or preliminary work, or will allow such partial or complete removal as can be secured with the funds so far appropriated; and you further ask whether the error in the above quoted provision of the deficiency act in reciting that the prior act was approved May 10, 1910, when in fact it was approved May 9, 1910, renders the latter appropriation invalid.

The purpose of the act of May 9, 1910, is, I think, clearly stated in its caption, to wit: "An act providing for the raising of the United States battle ship *Maine*, in Habana Harbor, and to provide for the interment of the bodies therein." That is, it was not intended to authorize and direct that a mere preliminary preparation for the raising of the vessel and the interment of the bodies be made, but that the vessel be actually raised and the bodies interred. This is further shown by the direction given to the Secretary that he remove the mast of said battle ship and place the same

in Arlington National Cemetery "at or near the spot where the bodies of those who died through such wreck are interred," thus treating the interment of the bodies as an accomplished fact.

It will also be noted that the appropriation of \$100,000 made therein was "on account" of the work, which shows that it was expected by Congress that the appropriation would not meet the entire cost of the work, but that when needed a sufficient additional appropriation or appropriations would be made. And this intention was carried out, in part at least, by the subsequent appropriation of \$200,000 as an "additional amount for *the raising or the removal* of the wreck of the battle ship *Maine*;" not for the *preparation* for its raising or removal.

I am of the opinion, therefore, that it is the duty of the Secretary of War to secure such partial or complete removal of the wreck, and interment of the bodies, as can be done with the funds appropriated.

I do not think the clerical error of reciting that the act of May 9, 1910, was approved on May 10 can have any effect on the last appropriation. Without any reference to the former act, it is sufficiently stated in this provision itself for what purpose the appropriation was made.

Respectfully,

J. A. FOWLER,
Acting Attorney-General.

THE SECRETARY OF WAR.

CIVIL SERVICE—ELIGIBILITY—ATTORNEY-GENERAL—
OPINIONS.

The Attorney-General can not properly render an opinion to the head of an executive department regarding the eligibility of a temporary clerk to permanent appointment under the civil service, as that is not a question arising in the administration of a department which its head is called upon to determine.

Jurisdiction to determine the eligibility of an applicant for appointment in the classified service lies with the Civil Service Commission.

The Attorney-General will not undertake to find the facts involved in a request for an opinion. Such request must be accompanied by a definite statement of the facts upon which the question of law arises.

DEPARTMENT OF JUSTICE,

August 1, 1910.

SIR: I beg to acknowledge the receipt of your letter of the 20th instant, with inclosures, in regard to the eligibility of Mary I. Wells for appointment to a position in the Geological Survey within the classified service.

I regret to advise you that, under the circumstances disclosed by your communication, I find myself unable to express any opinion on this matter.

In the first place, it is to be observed that you do not state the facts of the case, but leave me to infer them from certain correspondence between the Civil Service Commission and the Director of the Geological Survey. It has been repeatedly held that the Attorney-General will not undertake to find the facts involved in a request for an opinion, but that such request must be accompanied by a definite statement of the facts upon which the question of law arises. (19 Op. 465; 20 *ib.* 493; 24 *ib.* 102.)

But there is another and more conclusive reason why I should decline to render an opinion in this case. The question as to the eligibility of Miss Wells for appointment in the classified service is one of mixed law and fact which, as I understand the civil-service act and rules, is to be determined by the Civil Service Commission.

In an opinion rendered the President May 25, 1907, Attorney-General Bonaparte said (26 Op. 260, 261):

“* * * The civil-service act provided a comprehensive scheme for determining the relative merit and fitness of certain classes of persons applying for positions in the public service. It authorized the President to extend the classification from time to time as he might see fit, and to promulgate such rules as might be necessary for carrying the act into effect. It further created a commission of three members, which was charged with the duty of assisting the President in preparing the rules which were to provide for open competitive examinations. The general management of these examinations has been, by every set of rules promulgated in accordance with this provision, vested wholly in the commission. The whole object of the commission’s existence is to determine who shall be

eligible for appointment to positions in the government service. * * *

It appears from the correspondence referred to that the Director of the Geological Survey has requested the Civil Service Commission to make the appointment of Miss Wells permanent, she having heretofore received a temporary appointment. This the Civil Service Commission refuses to do, differing with the director as to the eligibility of Miss Wells for permanent appointment. Manifestly, since jurisdiction to determine the eligibility of Miss Wells for appointment lies with the Commission, it would be improper for me to express an opinion on that question in response to your inquiry, notwithstanding the fact that the place to be filled is in your department. In short, the question presented is not one arising in the administration of your department which you are called upon to determine, and upon which my opinion may be requested under section 356 of the Revised Statutes, but it is a matter for the determination of the commission, pursuant to the civil-service statutes and regulations.

Respectfully,

WILLIAM R. HARR,
Acting Attorney-General.

THE SECRETARY OF THE INTERIOR.

CIVIL SERVICE—CENSUS OFFICE TRANSFERS.

During the decennial census period clerks in the Census Office may be transferred from the permanent to the temporary force under the act of July 2, 1909 (36 Stat. 1), without losing their status in the classified service of the Government.

DEPARTMENT OF JUSTICE,
August 2, 1910.

SIR: I beg to acknowledge the receipt of your letter of the 20th instant, as follows:

"In organizing the greatly increased force of the Bureau of the Census authorized by the act of Congress approved July 2, 1909, preparatory to the taking of the Thirteenth Census of the United States, it became necessary, in the

summer of 1909, for administrative reasons of the highest order, to transfer approximately ninety experienced clerks from the rolls of the Census Office, established pursuant to the permanent census act of March 6, 1902, and its amendments, to positions created by section 6 of the act to provide for the Thirteenth and subsequent decennial censuses, approved July 2, 1909, particularly to the additional clerkships of classes two, three, and four authorized by that section. Recently a doubt has been raised as to whether these transfers were legally made and whether the persons transferred lawfully hold the new positions to which they have been appointed. A situation is thus created which calls for the promptest action on the part of the department. No action can be taken, however, until the department is advised with regard to the legal status of the clerks transferred as above described. Accordingly, I have the honor to request an expression of your opinion as to whether the transfers in question were lawfully made.

"For your further information I inclose a letter of the Director of the Census, dated July 18, 1910, setting forth in detail the facts in the premises, together with the considerations which led to the transfers in question and the reasons why it was believed that such transfers were authorized by law."

Sections 6 and 7 of the act approved July 2, 1909 (36 Stat. 1), provide:

"SEC. 6. That in addition to the force hereinbefore provided for and to that already authorized by law there may be employed in the Census Office during the decennial census period, and no longer, as many clerks of classes four, three, two, and one; as many clerks, copyists, computers, and skilled laborers, with salaries at the rate of not less than six hundred dollars nor more than one thousand dollars per annum, and as many messengers, assistant messengers, messenger boys, watchmen, unskilled laborers, and charwomen, as may be found necessary for the proper and prompt performance of the duties herein required, these additional clerks and employees to be appointed by the Director of the Census: *Provided*, That the total number

of such additional clerks of classes two, three, and four shall at no time exceed one hundred: * * *.

"SEC. 7. That the additional clerks and other employees provided for in section six shall be subject to such special test examination as the Director of the Census may prescribe. * * *: *Provided, however,* That when the exigencies of the service require, the Director may appoint for temporary employment not exceeding sixty days' duration from the aforesaid list of eligibles those who, by reason of residence or other conditions, are immediately available; and may also appoint for not exceeding sixty days' duration, persons having had previous experience in operating mechanical appliances in census work whose efficiency records in operating such appliances are satisfactory to him, and may accept such records in lieu of the civil-service examination: *And provided further,* That employees in other branches of the departmental classified service who have had previous experience in census work may be transferred without examination to the Census Office to serve during the whole or a part of the decennial census period, and at the end of such service the employees so transferred shall be eligible to appointment to positions in any department held by them at date of transfer to the Census Office, without examination: *And provided further,* That during the decennial census period and no longer the Director of the Census may fill vacancies in the permanent force of the Census Office by the promotion or transfer of clerks or other employees employed on the temporary force authorized by section six of this act: * * *."

It appears from the Director's letter of the 18th instant that under date of July 2, 1902, the Solicitor of your Department rendered an opinion in favor of the legality of such transfers from the permanent to the temporary force of the Census Office, in which he said:

"So far as the 'means by which a person could be transferred from the permanent force to the temporary force' are concerned, the act appears to contain no authority for such transfers in specific terms. It does provide, however, (a) that employees in other branches of the departmental classified service who have had previous experience in

census work may be transferred without examination to the Census Office, to serve during the whole or part of the decennial census period, and preserves the eligibility of such persons to be reinstated in their former positions, and (b) that persons employed on the temporary force may, during the decennial census period, be appointed to positions in the permanent force.

"The inference to be drawn from these two provisions appears to be a sufficient answer in case any question might be raised as to the authority of the Director of the Census to transfer employees from the permanent to the temporary force. Congress has put a premium upon previous experience in the Census Office. The act for the taking of the Thirteenth Census is designed to furnish suitable machinery for the accomplishment of the extraordinary duties devolving upon the Director of the Census during the decennial census period. The positions created during that period are intended to be appropriate to the necessities of the case, and an efficient administration of the law would seem to require that the Director should have the power to assign persons holding positions in the permanent force of the Census Office to perform the extraordinary duties that arise during the decennial census period. While Congress appears not to have provided in specific terms, it is thought that no serious question can be raised as to the authority of the Director to so transfer persons employed on the permanent force to the temporary force. It is not thought that there need be any hesitation in assuming that such authority exists."

Acting under this advice of the Solicitor, the Director states that he "proceeded to promote from time to time a large number, approximately 90, of the clerks on the permanent census roll to higher positions on the temporary roll provided by section 6 of the Thirteenth Census act, and additional promotions of the same character are now pending before the department."

It appears, however, that on the 11th instant the Comptroller of the Treasury rendered you an opinion, in which, referring to the last two provisos of section 7 of the act of July 2, 1909, he said:

"This clearly provides that the temporary or additional force provided by section 6 of the act may be transferred or promoted to vacancies on the permanent force, but in such cases the service must terminate at the end of the decennial census period. There is no provision for the transfer of any of the *permanent* force to places on the temporary or additional force provided by section 6 of the act. The latter is practically what is proposed to be done. I have, therefore, to answer your amended question in the negative."

In his letter to you of the 18th instant, the Director states that "the Comptroller, in a personal conference, states that this question is primarily one for the Attorney-General, as it involves primarily the right of the Director of the Census to make the appointments or transfers in question, the question whether they can be paid or not being dependent upon the answer to this primary question." This statement of the Comptroller relieves me from all embarrassment arising from the fact that I am, in effect, called upon to review the decision of the Comptroller.

After carefully considering this matter, I concur in the interpretation originally placed upon the act of July 2, 1909, by the Solicitor of your Department, and acted upon by the Director of the Census.

While the act of July 2, 1909, does not expressly authorize the transfer or promotion of clerks on the permanent census roll to the temporary roll, it does not forbid such transfer, nor am I aware of any provision of the civil-service laws or regulations that does so. It may be observed that general authority to make such assignments of departmental forces as the exigencies of the service may require is given the head of each department by section 161 of the Revised Statutes.

It appears from the letter of the Director of the Census of July 18, 1910, that it was the intention of his predecessor, Mr. North, when the first plans for a census bill were discussed, that most of the additional positions of the higher grades proposed to be created by the Thirteenth Census act should be filled by promotion of clerks on the permanent roll, and that this intention was called to the

attention of the Committee on the Census of the House of Representatives, under date of January 22, 1908, by Mr. North in a written memorandum in which he said:

"It is obvious that to secure the best results, the permanent clerks must be eligible to temporary positions at the higher grades, and that temporary clerks must be eligible to permanent statutory positions during the three-year decennial period. In other words, permanent and temporary positions, and their occupants, must be interchangeable with perfect freedom in order to insure the highest efficiency.

"No permanent clerk should lose his status in the classified service by reason of the fact that he is transferred to a temporary position.

"No temporary clerk should secure a classified service status by reason of the fact that he may temporarily occupy a permanent statutory position.

"Once this general principle is recognized, there is no difficulty in framing a provision of law to carry it out. I believe the bill as introduced accomplishes the purpose."

It also appears that Mr. North, under date of December 4, 1908, submitted a memorandum to the subcommittee of the House Committee on Appropriations in charge of the legislative, executive, and judicial appropriation bill for 1910, which contained the following statement:

"The census bill provides for 100 additional temporary positions carrying a compensation of from \$1,400 to \$1,800 per annum. The majority of these higher-salaried places must be filled by employees now in the service, whose training and experience will make them of greater value to the work than the services of the inexperienced temporary clerks. To fill the places on the permanent roll which the present occupants would thus temporarily vacate with eligibles from the regular civil-service registers would force these experienced permanent clerks out of the service at the expiration of the three-year period, when the temporary positions will cease to exist by operation of law."

At this hearing Mr. North also stated orally the intention of transferring permanent clerks to the higher positions proposed to be created by the Thirteenth Census

bill, and the matter was discussed at some length by members of the committee.

The intention of Mr. North to transfer clerks on the permanent force to the temporary force was also brought out incidentally in the discussion on the floor of the House when the bill making appropriations for the Thirteenth Census was under discussion in Committee of the Whole. Representative Tawney, who was in charge of the bill, said (Cong. Rec. of June 24, 1909, vol. 44, p. 3781):

"Mr. Chairman, I desire to call the attention of the committee to the statement that Mr. North made when before the Committee on Appropriations on this very estimate, in which he says:

"You can not conduct a decennial census office in any other way than with a lump-sum appropriation. I think that is clear. That is what we are up against. The pending census bill provides for a hundred additional clerks at salaries from \$1,400 to \$1,800. Those positions will be filled, practically all of them, by promotions from our regular force. * * *"

It will be observed that section 7 of the act of July 2, 1909, authorizes the Director of the Census, "during the decennial census period, and no longer," to fill vacancies in the permanent force of the Census Office by the promotion *or transfer* of clerks or other employees employed on the temporary force authorized by section 6. In the light of the above-quoted statements of Mr. North to the House committees, the reason for authorizing the transfer of clerks from the temporary to the permanent force seems apparent. It was evidently contemplated by Congress, as recommended by Mr. North, that permanent and temporary positions should be interchangeable, and that no permanent clerk should lose his status in the classified service by reason of his transfer to a temporary position, and no temporary clerk should secure a permanent status by reason of his transfer to a permanent position. Mr. North stated that he thought the bill as introduced accomplished this purpose, and I understand that there was no change in the form of the bill in this respect from the time it was introduced until it was passed.

Under all the circumstances, I think it clear that the transfers from the permanent to the temporary census force to which you refer were authorized by law.

Respectfully,

WILLIAM R. HARR,
Acting Attorney-General.

The SECRETARY OF COMMERCE AND LABOR.

DISTRICT OF COLUMBIA—TITLE TO LANDS SOUTH OF
SQUARES NOS. 955 AND 979.

All land south of 140 or 138 feet on Tenth street and the southern boundary line of squares 955 and 979, in the District of Columbia, is the property of the United States. Land made by artificial means does not fall within the doctrine of accretions.

DEPARTMENT OF JUSTICE,
August 20, 1910.

SIR: Replying to your letters of the 26th ultimo and the 2d instant, both relating to the matter of the metes and bounds of squares Nos. 955 and 979 in this city, desired for use in connection with the acquisition of land for a branch railroad track and for yardage to be used for the navy-yard, I have the honor to advise you that said squares 955 and 979 each front 231.9 feet on O street SE. (bisected by Tenth street, which is 85 feet wide).

Square 955 extends south along Tenth street for 140 feet, from which point on Tenth street the boundary line of said square runs northwesterly along a curved irregular line until the same meets O street in the northwesterly corner of lot 5 thereof on Ninth street.

Square 979 extends south along Tenth street a distance of 138 feet, from which point the boundary line of said square runs in an irregular line northeasterly until it meets the east boundary line of said square on Eleventh street 72 feet south of O street.

I submit herewith a tracing (marked "R. T. S., August 16, 1910") showing the above measurements, the south boundary and high-water line of said squares being shown in red. In finding and fixing the south or water boundary of said squares I have used the "King," "Dermott,"

"Ellicott," and "L'Enfant" maps of Washington, as well as other maps showing the boundaries of Duddington or Cerne Abbey Manor, out of which said squares are taken.

The four maps referred to above "are to be taken together as representing the intentions of the founders of the city and, so far as possible, are to be reconciled as parts of one scheme or plan" (see *Morris v. United States*, 174 U. S. 256).

The question naturally arises as to the ownership of the land south of said squares according to the southern boundary thereof as given above, which is shown by said maps to have been submerged land.

At the time of the division of lots and squares between the United States and the original proprietors, there was submerged land below the southern boundary of said squares 955 and 979, as indicated above, the same forming the bed of the Eastern Branch or Anacostia River, the title of the United States to which was derived and rests upon the cession made by the legislature of the State of Maryland, December 23, 1788, entitled "An act to cede Congress a district ten miles square in this city," which was accepted by the act of Congress approved July 16, 1790, and the act of March 3, 1791, amendatory thereof, and which was subsequently reratified by the act of the State of Maryland, passed December 19, 1791.

By this legislation the United States became vested with the title to the lands under the navigable waters to high-water mark within the limits of the territory ceded, embracing both the Eastern Branch or Anacostia River and the Potomac River, which title has always been held since said legislation by the United States, as it was previously held by the State of Maryland, in trust for public purposes, for "when the Revolution took place the people of each State became themselves sovereign and in that character held the absolute right to all their navigable waters and the soil under them for their own common use." (*Morris v. United States*, 174 U. S. 196; *Martin v. Waddell*, 16 Pet. 367; *Shively v. Bowlby*, 152 U. S. 1.)

Therefore, I am of opinion that all land south of 140 or 138 feet on Tenth street and the southern boundary line

of said squares, curving northwesterly as to square 955 and northeasterly as to square 979, is the property of the United States.

It is probable that the owners of the uplands north of the southern boundary line of said squares may and do claim the land south of said boundary line as accretion to the upland, which event can only take place where the accretions are "gradual and imperceptible formations of land * * * by alluvial deposits" (see *Jefferis v. East Omaha Land Company*, 134 U. S. 178); but the above rule does not apply in the "case of sudden perceptible changes and such changes * * * affect no change in the ownership of any portion of the soil" (see *St. Louis v. Rutz*, 138 U. S. 226), nor does the rule apply where the change in the property is made by violent and sudden means, the change being perceptible. (The Modern Law of Real Property, Tiffany, 453.)

Accretion is defined to be—

"A mode of acquiring title to realty, where portions of the soil are added by gradual deposit, through the operation of natural causes to that already in possession of the owner." (Anderson's Dictionary of Law, p. 19.)

The deposit itself is ordinarily called "alluvion," which is defined to be—

"by the common law the addition made to land by the washing of the sea, a navigable river or other stream, whenever the increase is so gradual that it can not be perceived in any one moment of time." (*Ib.* 52.)

From an inspection of all of the land south of 140 and 138 feet and the red line referred to on said tracing to the waters' edge, at the present time a distance of more than 275 feet, it can be plainly seen that the additional land is made by a filling in of ashes and other substance and that this point has been used as a general dumping ground by the navy-yard to dispose of ashes and refuse collected therein. Land formed by artificial means, such as dumping, does not fall within the doctrine of accretions. By the common law such additions to land on navigable waters belong to the Crown. (*Barney v. Keokuk*, 94 U. S. 337.)

The doctrine of accretions rests upon an increase by perceptible degrees through natural causes, such as the ordinary action of water. It does not apply to land reclaimed by man through filling in land once under water and making it dry. (*Sage v. The Mayor*, 154 N. Y. 61, 83; *Cyclopedia of Law and Procedure*, vol. 29, p. 351 (85).)

But independent of this view, the owners of squares 955 and 979 would not be entitled to any accretion thereto, either from natural or artificial means, for—

“from the first conception of the federal city, the establishment of a public street, bounding the city on the south and to be known as Water street, was intended, and such intention has never been departed from; and it follows that the holders of lots and squares abutting on the line of Water street are not entitled to riparian rights, nor are they entitled to rights of private property in the waters or the reclaimed lands lying between Water street and the navigable channels of the river unless they can show a valid grant to the same from Congress * * *.” (*Morris v. United States*, 174 U. S. 197.) “The failure of the city to open Water street creates no title * * * to the land and waters south of the territory appropriated for that street.” (*Ib.*)

The decision in the case of *Morris v. United States* as to Water street, although pertaining to the Potomac River side of Washington, is applicable in every respect to that side of Washington bounded by the Eastern Branch or Anacostia River, as the King, Dermott, Ellicott, and L'Enfant maps, taken together, plainly indicate that Water street was to run along the Eastern Branch, or Anacostia River, in front of the tracts in question.

I return to you herewith two abstracts of title—No. 36090 A, covering square 955, and No. 36090, covering square 979—both prepared by the District and Washington Title Insurance companies.

Respectfully,

WILLIAM R. HARR,
Acting Attorney-General.

THE SECRETARY OF THE NAVY.

EIGHT-HOUR LAW—CONSTRUCTION OF SUBMARINE TORPEDO BOATS.

The act of August 1, 1892 (27 Stat. 340), known as the eight-hour law, does not apply to the construction of torpedo boats and torpedo-boat destroyers provided for in the act of June 24, 1910 (36 Stat. 628).

DEPARTMENT OF JUSTICE,

August 25, 1910.

SIR: I beg to acknowledge the receipt of your letter of the 17th instant, inquiring whether the eight-hour provision in the naval appropriation act approved June 24, 1910 (36 Stat. 628), applies to the construction of the four submarine torpedo boats and the six torpedo-boat destroyers authorized by that act.

The provisions of the statute necessary to be considered are as follows:

“INCREASE OF THE NAVY.

“That, for the purpose of further increasing the naval establishment of the United States, the President is hereby authorized to have constructed two first-class battle ships to cost, exclusive of armor and armament, not exceeding six million dollars each, similar to the battle ship authorized by the act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and nine.

“Two fleet colliers of fourteen knots trial speed, when carrying not less than twelve thousand five hundred tons of cargo and bunker coal, to cost not exceeding one million dollars each.

“And the contract for the construction of said vessels shall contain a provision requiring said vessels to be built in accordance with the provisions of an act entitled ‘An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia,’ approved August first, eighteen hundred and ninety-two, and shall be awarded by the Secretary of the Navy to the lowest best responsible bidder, having in view the best results and most expeditious delivery; and in the construction of all of said vessels the provisions of the act of

August third, eighteen hundred and eighty-six, entitled 'An act to increase the naval establishment,' as to materials for said vessels, their engines, boilers, and machinery, the contracts under which they are built, the notice of any proposals for the same; the plans, drawings, specifications therefor, and the method of executing said contracts shall be observed and followed, and, subject to the provisions of this act, except that the Secretary of the Navy may accept, in lieu of an indemnity bond, the deposit by contractors of United States Government or state bonds, under such conditions and in such manner as the Secretary may prescribe, having due regard for the rights and protection of the United States, all said vessels shall be built in compliance with the terms of said act, and in all their parts shall be of domestic manufacture; and the steel material shall be of domestic manufacture, and of the quality and characteristics best adapted to the various purposes for which it may be used, in accordance with specifications approved by the Secretary of the Navy, provided contracts for furnishing the same in a reasonable time, at a reasonable price, and of the required quality can be made with responsible parties: *Provided*, That not more than one of the battle ships provided for in this act shall be built by the same contracting party: *Provided always*, That one of the battle ships herein authorized shall be constructed in one of the navy-yards.

"For four submarine torpedo boats in an amount not exceeding in the aggregate two million dollars, and the sum of eight hundred thousand dollars is hereby appropriated toward said purpose.

"For six torpedo-boat destroyers, to have the highest practicable speed, and to cost in all not to exceed seven hundred and fifty thousand dollars each, and toward the construction of said torpedo-boat destroyers the sum of two million two hundred and twenty-five thousand dollars is hereby appropriated."

* * * * *

It is manifest that, considering the statute grammatically the provisions of the third paragraph above quoted, including the provision in respect to the act of August 1,

1892, commonly called the eight-hour law, have no reference to the four submarine torpedo boats and six torpedo-boat destroyers referred to in the two subsequent paragraphs. The only question is whether there is anything in the history of this legislation which would warrant a different construction.

The provision of the third paragraph which requires the contract for the construction of "said vessels" to contain a provision requiring them to be built in accordance with the provisions of the eight-hour law was inserted by amendment when the bill was before the House sitting in Committee of the Whole (45 Cong. Rec. 4440). The proceedings in this connection are referred to in the opinion to you of July 8, 1910, upon the scope of this provision. It will be noted that Mr. Fitzgerald, who moved this amendment, said (*ib.* 4441):

"Mr. Chairman, the effect of this amendment, if adopted, will be to require all contracts for the construction of vessels which are authorized in this bill to contain a provision that the vessels shall be built in accordance with the eight-hour law. I wish to say that I believe the eight-hour law should apply to these contracts." * * *

It appears that at the time the bill was before the House it contained the provision for the construction of four submarine torpedo boats, and that such provision appeared in the order that it does now, following the paragraph in regard to contracts and construction work. The bill did not, however, contain the provision which now appears in the act in reference to the six torpedo-boat destroyers. This latter provision was inserted by way of amendment in the Senate.

It is manifest from a reading of the statute that the provision in relation to the eight-hour law can have no broader application than the original provisions of the paragraph in which it was inserted, and an examination of the previous legislation of Congress makes it clear that that paragraph as originally framed, and which required that the act of August 3, 1886, should be observed and followed in the construction of the vessels referred to, was not intended to apply to the four submarine torpedo boats subsequently authorized.

Provision "for building a submarine torpedo boat and conducting experiments therewith" was first made by the act of March 3, 1893 (27 Stat. 718), no reference being made therein to the act of August 3, 1886, although the three gunboats authorized to be constructed by a subsequent provision of the same act were required to be built in accordance with the provisions of the act of August 3, 1886 (*ib.* 731).

The next appropriation for submarine torpedo boats was made by the act of June 10, 1896 (29 Stat. 379), under the head of "Increase of the Navy," the provision therefor following the paragraph making appropriations for several battle ships and torpedo boats and containing certain provisions in regard to their construction, including the provision that the act of August 3, 1886, should be followed.

In subsequent appropriation acts, a like distinction in regard to the application of the act of August 3, 1886, was made between submarine torpedo boats and the other vessels authorized. (Act of March 3, 1899, 30 Stat. 1039; act of June 7, 1900, 31 Stat. 707; act of March 3, 1903, 32 Stat. 1202; act of April 27, 1904, 33 Stat. 351; act of June 29, 1906, 34 Stat. 583; act of March 2, 1907, 34 Stat. 1204; act of May 13, 1908, 35 Stat. 158; act of March 3, 1909, 35 Stat. 777.)

The reason for not requiring submarines to be built in accordance with the provisions of the act of August 3, 1886, was doubtless, as the statutes authorizing their construction or purchase indicate, because such vessels were more or less of an experiment and it was therefore advisable to give the Secretary of the Navy considerable latitude in their acquisition.

As above stated, the provision in the act of June 24, 1910, as to the six torpedo-boat destroyers was inserted in the Senate, being one of the amendments reported by the Senate Committee on Naval Affairs. Torpedo-boat destroyers had previously been legislated for in the same manner as battle ships, in the respect under consideration, and the provisions of the act of August 3, 1886, applied to their construction (act of June 30, 1890, 26 Stat. 205; act of May 4, 1898, 30 Stat. 389; act of June 29, 1906, 34 Stat. 582; act of March 2, 1907, 34 Stat. 1203), except that in the act of

March 3, 1909 (35 Stat. 777), which in one paragraph authorized five torpedo-boat destroyers and in a subsequent paragraph three destroyers "whose vitals are located below the normal low-water line," Congress, by placing the one paragraph before and the other after that requiring the vessels to be constructed in accordance with the act of August 3, 1886, put the latter vessels in the same category as submarine torpedo boats, with respect to the application of that statute.

I can see nothing in the previous legislation on this subject or the legislative history of the act of June 24, 1910, which warrants a departure from the plain reading of the latter statute with respect to the application of the provisions of the third paragraph above quoted. In terms, such provisions apply only to the battle ships and colliers previously authorized. It is clear, from what has been said, that they were not intended to apply to the submarine torpedo boats subsequently authorized, and the fair inference from the action of the Senate in placing the paragraph for the six torpedo-boat destroyers after the provision for the four submarine torpedo boats, instead of before the paragraph in relation to contracts and construction work, is that it was thought inadvisable to apply the provisions of that paragraph, as amended by the addition of the eight-hour clause, to the torpedo-boat destroyers. It is to be observed that the application of the eight-hour law to the construction of public vessels was a new departure, and the presumption is that the Senate did not care to go further in that respect than the House had already done.

I have therefore to advise you that the provision in regard to the eight-hour law in the act of June 24, 1910, does not apply to the construction of the four submarine boats and the six torpedo-boat destroyers authorized thereby.

Respectfully,

WILLIAM R. HARR,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

GLOBE SURETY COMPANY, OF KANSAS CITY—CERTIFICATION AS AN ACCEPTED SOLE SURETY.

The Globe Surety Company, of Kansas City, Mo., having the power to guarantee the fidelity of persons holding positions of public or private trust and the power to execute and guarantee bonds and undertakings in judicial proceedings, possesses appropriate corporate powers to entitle it to certification as a sole surety under the provisions of the acts of Congress of August 13, 1894 (28 Stat. 279), and of March 23, 1910 (36 Stat. 241).

DEPARTMENT OF JUSTICE,

September 2, 1910.

SIR: I have the honor to reply to your letter of the 11th ultimo, in which you ask my opinion as to whether the Globe Surety Company, of Kansas City, Mo., possesses appropriate corporate powers to entitle it to certification as an accepted sole surety under the provisions of the acts of Congress of August 13, 1894 (28 Stat. 279), and March 23, 1910 (36 Stat. 241).

Assuming that the document inclosed with your letter is, as it purports to be, a true copy of the charter of this corporation, and assuming that such powers as were acquired under that incorporation have not been lost, I am of opinion that it is entitled to the certificate.

The powers which the said acts of Congress require a corporation to possess as a condition precedent to the issue of certificate are, first, "the power to guarantee the fidelity of persons holding positions of public or private trust;" and, second, "the power to execute and guarantee bonds and undertakings in judicial proceedings."

The statute under which this corporation was organized, "An act relating to insurance other than life," R. S. Missouri, 1899, sec. 7945, Art. VI, chap. 119, divides its subject into four classes of powers, and no corporation is permitted to exercise the powers of more than one class. The particular corporation in question was formed under the third of these classes of powers, which is as follows:

"Third, to make insurance upon the health of individuals, and against personal injury, disablement, or death, resulting from traveling or general accident by land or water; to insure the fidelity of persons holding places of public and private trust, and also to receive on deposit and

insure the safe-keeping of books, papers, money, stocks, bonds and all other kinds of personal property, and to do any and all other kinds of legitimate insurance business."

The first of the two powers required by the acts of Congress, namely, the power to guarantee the fidelity of persons holding positions of public and private trust, is authorized by this clause explicitly, in so many words.

The other required power, namely, the power to execute and guarantee bonds and undertakings in judicial proceedings, is not explicitly mentioned in section 7945, but it is, nevertheless, in my opinion, authorized under the clause "and to do any and all other kinds of legitimate insurance business." Even if the rule of *ejusdem generis* should be applied, I should consider the power in question to be included, but that rule is held not to be applicable to the clause. (*State v. Phelan*, 66 Mo. App. 548.) The general language is therefore unrestricted. I think, moreover, that the existence of this power is put beyond question by section 7946 of the Missouri Revised Statutes of 1899, being the section next following that under which the company was organized. This section provides as follows:

"SEC. 7946. Any company having a paid-up capital of not less than two hundred thousand dollars, organized and incorporated under the laws of this * * * State for the purpose of transacting the business of becoming surety on the bonds or obligations of persons or corporations, or of insuring the fidelity of persons holding places of public or private trust, * * * may, on production of evidence of solvency satisfactory to the court, judge, * * * become and be accepted as surety on the bond, recognizance, or other writing obligatory of any person or corporation in or concerning any matter in which the giving of a bond or other obligation is authorized, required or permitted by the laws of the State."

The requisite powers being therefore available to Missouri corporations under the statute, the final question is whether the charter of this particular corporation has assumed them. On this question there appears to be no difficulty, inasmuch as the charter in terms enumerates all

the powers, specific as well as general, which are authorized under the third class of section 7945, and also the particular powers to which section 7946 refers as qualifying the corporation to act as surety in judicial proceedings.

I am of opinion, therefore, that so far as its charter is concerned, this corporation possesses the requisite powers to entitle it to certification as acceptable sole surety under the provisions of the acts of Congress.

I return the certified copy of the charter as requested.

Very respectfully,

WINFRED T. DENISON,
Assistant Attorney-General.

Approved:

WILLIAM R. HARR,
Acting Attorney-General.

THE SECRETARY OF THE TREASURY.

MINE-RESCUE WORK—PURCHASE OF LAND FOR EXPERIMENTATION AND INSTRUCTION.

The acts of May 16, 1910 (36 Stat. 369), establishing a Bureau of Mines, and of June 25, 1910 (36 Stat. 742), making appropriation for its maintenance, do not authorize the purchase of land for mine-rescue stations. Lands, or interest in lands, acquired by the United States without consideration, or for a mere nominal sum, do not evidence a purchase within the meaning of section 355 of the Revised Statutes.

Moneys appropriated for the maintenance of the Bureau of Mines may be expended in the erection of temporary structures on land acquired by the United States for mine-rescue work.

The validity of the titles to the lands proposed to be acquired for mine-rescue work should be submitted to the Attorney-General.

DEPARTMENT OF JUSTICE,
September 15, 1910.

SIR: Your communication of September 9, 1910, was duly received. You submit therein for my inspection three instruments, one of which is a proposed lease without a consideration for a parcel of land described therein, from the city of Evansville, Ind., to the United States, for a designated period of ninety-nine years, the lessee, however, to have the right to abandon same at any time upon thirty days' written notice.

The second instrument is a proposed lease of a tract of land from the Huntington Land Company, of Huntington, W. Va., a corporation, to the United States. This lease is for the nominal compensation of \$1.66 per month, and provides that the lease may be terminated at the end of any calendar month upon giving thirty days' written notice, that any buildings, fixtures, appurtenances, and improvements may be removed therefrom upon the termination of the lease, and it also contains an option of purchase during a period of time specified therein.

The third instrument is a proposed absolute conveyance of a certain tract of land, lying in Birmingham, Ala., from J. H. Woodward to the United States, for the nominal consideration of \$1.

You state that it is the desire of the Bureau of Mines that the said instruments shall be accepted by the United States, and that temporary structures be placed thereon, to be used by said bureau for experimentation and instruction in mine rescue work, as provided for in the statute creating said bureau. And you ask my opinion upon the following questions:

"1. Do the acts of May 16, 1910, establishing a Bureau of Mines in the Department of the Interior, and of June 25, 1910, making appropriation for its maintenance, authorize the purchase of land for mine rescue stations?

"2. Do the proposed instruments of conveyance herewith submitted evidence a purchase by the United States within the meaning of section 355 of the Revised Statutes, and if they do evidence such purchase, may moneys appropriated for the maintenance of said Bureau of Mines be expended in the erection of public buildings upon said lands?"

"3. Would short term leases of land for the purpose of erecting temporary structures thereon for the uses of the Bureau of Mines amount to a purchase within the meaning of said section, and may such short term leases be entered into for lands as to which a duly authenticated abstract of title has been submitted and the validity of the title established to the satisfaction of the Attorney-General?"

There is a preliminary question whether under section 3736 of the Revised Statutes, the instruments in question can be accepted by the United States. This section provides that "No land shall be purchased on account of the United States except under a law authorizing such purchase." Neither the act creating the Bureau of Mines nor the act making appropriation for its maintenance authorizes the purchase of lands; and whether or not the lands, or interest in lands, designated in the above instruments, fall within the provisions of this statute depends upon the meaning of the word "purchase" as used therein. There are many authorities which hold that this word in its most enlarged sense signifies the lawful acquisition of real estate by any means whatever except by descent; yet its meaning has often been restricted because the context of the Statute or instrument in which it appears clearly indicated that it was intended to be used in a narrower sense.

For illustration in *City of Enterprise v. Smith* (62 Kansas 815), it was held that the word "purchasing" in the caption of an act which authorized cities to obtain water by purchasing or constructing waterworks was used in its popular and restricted sense "of acquisition of property by voluntary agreement, for a valuable consideration;" and that therefore the section of the act which undertook to authorize the condemnation of such property was unconstitutional and void, because such power was not embraced in the caption.

In *Kohl v. United States* (91 U. S. 367, 374), it was said by the Supreme Court of the United States that—

"* * * the words 'to purchase' might be construed as including the power to acquire by condemnation; for, technically, purchase includes all methods of acquisition other than that of descent. But generally in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties, without governmental interference."

In *Purcell v. Smith* (21 Iowa, 540, 546), it was held that the word "purchase" under a statute which conferred upon a certain class of aliens the right to acquire real estate by

purchase was used in "the more limited or common signification, to wit, that of acquisition by bargain and sale for a consideration."

In accord with these authorities are also *Hoyt v. Van Alstyne* (15 Barb. 568); *Cheatham v. Bobbitt* (118 N. C. 343, 347); *Cobb v. Webb* (26 Tex. Civil App. 467-470); *Curtis v. Burdick* (48 Vt. 166, 171).

The section in question was taken from the act of May 1. 1820, ch. 52 (3 Stat. 568). And I think when Congress passed this act, as well as when it was introduced into the Revised Statutes, that body had in mind, primarily the expenditure of the money of the United States; and that it was not its purpose to prohibit the acquisition by the Government of real property otherwise than for a valuable consideration. This view is emphasized by the phrase "on account of the United States," which is the equivalent of saying "at the expense of" or "to be paid for by the United States;" and in as much as the acquisition of the land in question, does not involve an expenditure of money upon the part of the United States Government, or at least of anything more than a mere nominal sum, it is my opinion that the acceptance of neither of these instruments is prohibited by this statute.

The next question is whether the moneys appropriated by Congress for the Bureau of Mines can be used in placing such structures on these lands as will enable the bureau to carry out the purposes for which it was created. Under the principle that whenever a power is conferred by a statute the authority to adopt and use all means necessary to accomplish the object had in view may be implied, such expenditure undoubtedly can be made unless it is by express terms, or by implication, prohibited by statute. By section 355, Revised Statutes, it is provided that—

"No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building, of any kind whatever, until the written opinion of the Attorney-General shall be had in favor of the validity of the title, nor until the consent of the legislature of the

State in which the land or site may be, to such purchase, has been given."

It is suggested that this statute applies to the erection of buildings upon these lands. However, I find that it is unnecessary to pass upon this question. By examining the statutes of the States of Alabama, West Virginia, and Indiana, I find that the consent of the legislatures of these States to the purchase of lands for the purposes mentioned in said section 355, has been given. (Code of Alabama, 1907, sec. 898; West Virginia Code, sec. 4; Burns's Annotated Indiana statutes, revision of 1908, sec. 8112.)

If, therefore, section 355 is applicable, the written consent required of these States has already been obtained. But if it is not applicable, then the authority to erect structures is not prohibited, and is implied under the principle above suggested. I think it advisable, however, that the titles to these tracts of land be submitted to the Attorney-General for his opinion with reference to the validity thereof. This should be done as a wise precaution, regardless of whether said section 355 be applicable to the facts here presented or not.

I think you will find in the foregoing a sufficient answer to your inquiries without a detailed answer to each separate question.

Respectfully,

J. A. FOWLER,
Acting Attorney-General.

THE SECRETARY OF THE INTERIOR.

PAYMASTERS' CLERKS OF THE NAVY—RETIREMENT.

A paymaster's clerk of the Navy who is incapacitated for active service and whose incapacity is the result of an incident of the service, is entitled to be retired under the provisions of section 1453, Revised Statutes.

Paymasters' clerks, in reference to retirement, are placed in precisely the same condition under the act of June 24, 1910 (36 Stat. 606), as warrant officers.

Whenever there is a peremptory obligation on the part of the Government to do something with reference to a person, there is a corresponding right in that person to have it done.

Where no concrete facts are presented relative to the questions propounded, the Attorney-General will not express an opinion.

DEPARTMENT OF JUSTICE,
September 19, 1910.

SIR: I received your communication of August 19, 1910, from which and the documents accompanying it, the following facts appear:

Paymaster's Clerk Frank C. Adams, who has been serving as chief clerk to the general storekeeper at the navy-yard, at Washington, D. C., was on July 7, 1910, ordered to appear before the naval retiring board for examination. The examination being had on July 15, 1910, the board reported that Adams "is incapacitated for active service by reason of arterio sclerosis, and that his incapacity is the result of an incident of the service." The record of this examination having been transmitted to you as required by statute, and you being in doubt as to your legal duties in the premises, you ask my opinion as to whether Adams is entitled to be retired. Other questions are also propounded, but there being no concrete facts presented relating thereto, under the long established rule of this department I will have to refrain from expressing an opinion upon these questions; but I think proper answers will be readily deducible from what shall be said in reaching a conclusion upon the question properly before me.

If Adams is subject to retirement at all, it must be because the provision in the appropriation act of June 24, 1910 (36 Stat. 606), to-wit: "All paymasters' clerks shall, while holding appointment in accordance with law, receive the same pay and allowances and have the same rights of retirement as warrant officers of like length of service in the Navy," has so extended section 1453 of the Revised Statutes as to make it applicable to paymasters' clerks. This section reads as follows:

"When a retiring board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service with retired pay, as allowed by chapter eight of this title."

An able and exhaustive opinion was rendered by the Judge-Advocate-General, in which he maintains that section 1453, Revised Statutes, is not extended by the said provision of

the act of June 24, 1910, to paymasters' clerks, the two reasons upon which he justifies this conclusion being, first, that the act of June 24, 1910, undertakes to vest in the paymasters' clerks "*rights* of retirement," and not to require the Government to *enforce* a retirement, while section 1453, Revised Statutes, provides alone for a *compulsory* retirement, and therefore creates no *right* in the officer; and, second, that the phrase "like length of service in the Navy" in the latter act shows that the provision was intended to apply to retirements for length of service alone. Let us see to what result this process of reasoning leads.

The retirement of a warrant officer may occur under any of the following provisions of law:

(1) After forty years' service, under section 1443, Revised Statutes, to wit:

"When any officer of the Navy has been forty years in the service of the United States he may be retired from active service by the President upon his own application."

(2) Upon reaching the age of 62, under section 1444, Revised Statutes, to wit:

"When any officer below the rank of vice admiral is sixty-two years old, he shall, except in the case provided in the next section, be retired by the President from active service." (The exception in the following section does not include warrant officers.)

(3) For incapacity resulting as an incident to the service, under section 1453, which is above quoted.

(4) For incapacity not resulting as an incident to the service, under section 1454, Revised Statutes, to wit:

"When said board finds that an officer is incapacitated for active service and that his incapacity is not the result of any incident of the service, such officer shall, if said decision is approved by the President, be retired from active service on furlough pay, or wholly retired from the service with one year's pay, as the President may determine."

(5) After thirty years' service, under a provision of the naval appropriation act of May 13, 1908 (35 Stat. 128), to wit:

"When an officer of the Navy has been thirty years in the service, he may, upon his own application, in the dis-

cretion of the President, be retired from active service and placed upon the retired list with three-fourths of the highest pay of his grade."

Under the first reason advanced by the Judge-Advocate-General, the second, third, and fourth causes for retirement, to wit, because the officer has reached 62 years of age, because incapacitated as an incident to the service, and because incapacitated not as an incident to the service, do not fall within the act of June 24, 1910, and are not applicable to paymasters' clerks, because they all provide for *compulsory* retirement; and the last two, moreover, would be excluded under the second reason advanced, as they do not rest upon length of service. This would leave only the first and fifth grounds; but under the narrow construction thus sought to be placed upon the language of the act the fifth would also certainly and the first probably be excluded. The provision quoted from the act of May 13, 1908, does not declare that the officer may voluntarily retire for the reason mentioned. Such an idea is in fact negatived by placing his retirement entirely within the discretion of the President. The officer is vested with the right to make application for retirement, but there his *right* ends and the discretion of the President begins. The same is true with reference to the first ground unless the word "may" be given the same meaning as "shall." Consequently, if the reasons insisted upon apply to any of the grounds for retirement, they apply to all, unless it be the first, and the provision quoted of the act of June 24, 1910, has but little effect and possibly none whatever. But I do not think either of them can be sustained by sound reasoning. This provision was inserted in the act of June 24, 1910, for the benefit of paymasters' clerks, and should therefore receive a favorable construction in their behalf. It is conceded that section 1453, Revised Statutes, would be very beneficial to paymasters' clerks, much more so in fact than to warrant officers, because if incapacitated for service their appointments may be revoked and they be dismissed from the service, which can not be done with an officer. That such course would be pursued goes without saying, as the Navy Department

can not rely upon the labor of those who are wholly incapacitated for service. Therefore the protection and benefits of this section ought to be extended to these diseased and helpless officials if any reasonable interpretation of the act of June 24, 1910, will permit this to be done. However, it is unnecessary to resort to any strained construction to reach such a result, for the intention of Congress, as expressed in the act, is perfectly apparent.

With reference to the first insistence above mentioned, it is clear that under these and similar statutes, duty and right are correlative, and whenever there is a peremptory obligation upon the part of the Government to do something with reference to another, there is a corresponding right in that person to have it done. And none the less so when that is something desired by such other person, even though intended for the benefit of the Government. It is both the right and peremptory duty of the Government to retire an officer under the conditions mentioned. On the other hand, it is the *right* of the officer to be retired under the same conditions. Whether retirement may be beneficial to him or not has nothing to do with his *right* of retirement, and can only influence his determination as to whether or not he will enforce his right should the Government refuse or fail to carry out the mandate of the law. Nor can the phrase "of like length of service in the Navy" have the effect insisted upon. The meaning of this phrase, and why used, are apparent from that provision in the act of May 13, 1908 (35 Stat. 128), which reads:

"All paymasters' clerks shall, while on duty, receive the same pay and allowances as warrant officers *of like length of service in the navy.*"

The provision in question of the act of June 24, 1910, is precisely the same, except "while on duty" in the former act is "while holding appointment in accordance with law" in the latter, and the phrase "have the same right of retirement" is inserted before "of like length of service." This latter phrase therefore relates primarily to the pay of the paymaster's clerk, as it did in the former act. But inasmuch as there are certain instances in which the retirement depends upon the length of service, it was not inap-

propriate that the phrase be also applied to retirement, the meaning being that if a paymaster's clerk has served for the length of time mentioned in either section he shall be retired, or has the right of retirement, as provided for such length of service, but if he has not served for the requisite length of time, but another condition of retirement exists, he shall for such cause be retired. In other words, this act, with reference to retirement, places paymasters' clerks in precisely the same condition as are warrant officers.

I am of the opinion, therefore, that Paymaster's Clerk Adams should be retired under the provisions of section 1453, Revised Statutes.

Respectfully,

J. A. FOWLER,
Acting Attorney-General.

The SECRETARY OF THE NAVY.

PHILIPPINE ISLANDS—ENTRY OF GOODS FROM.

Section 14 of the tariff act of August 5, 1909 (36 Stat. 87), which prohibits the importation from foreign countries of goods made in whole or in part by convict labor, does not apply to goods coming into the United States from the Philippine Islands.

The Philippine Islands are not a "foreign country" within the meaning of the above-mentioned section.

The word "imported," in tariff laws, refers to merchandise entering the United States from foreign countries, and is never used with reference to shipments from domestic territory.

DEPARTMENT OF JUSTICE,

September 19, 1910.

SIR: I received your communication of August 7 wherein you inquire whether section 14 of the tariff act of August 5, 1909 (36 Stat. 87), which prohibits the importation from foreign countries of goods made in whole or in part by convict labor, applies to the Philippine Islands; and in reply thereto I have the honor to say:

Said section 14 reads as follows:

"That all goods, wares, articles, and merchandise manufactured wholly or in part in any foreign country by convict labor shall not be entitled to entry at any port of the

United States, and the importation thereof is hereby prohibited; and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision."

Section 5 of this act (36 Stat. 83) relates to the tariff on merchandise shipped between ports of the United States proper and the Philippine Islands, and this section begins with the following language:

"That there shall be levied, collected, and paid upon all articles coming into the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from foreign countries: *Provided*, That, except as otherwise hereinafter provided, all articles, the growth or product of or manufactured in the Philippine Islands from materials the growth or product of the Philippine Islands, or of the United States, or of both, or which do not contain foreign materials to the value of more than twenty per centum of their total value, upon which no drawback of customs duties has been allowed therein, coming into the United States from the Philippine Islands, shall hereafter be admitted free of duty," and there are specified a number of exceptions to this general provision, and many provisos are added which have no material bearing upon the question here presented.

The question is whether the Philippine Islands are a "foreign country" within the meaning of said section 14. I am of the opinion that they are not. The language of section 5 clearly shows that the Philippine Islands are not a foreign country within the meaning of that section, in that it declares that upon goods "*coming into* the United States from the Philippine Islands" shall be imposed the same rates of duty as upon "*like articles imported* from foreign countries."

The word "imported" in tariff laws refers to merchandise entering the United States from foreign countries, and is never used with reference to shipments from domestic territory; hence, merchandise from the Philippines is spoken of in the act as "*coming into*," and not as "*imported*" into the United States. Moreover, if those

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islands had been regarded as foreign territory, other countries would have been mentioned as "*other* foreign countries," and not merely as "foreign countries." Also, further along in that part of the section above quoted "*foreign material*" is mentioned in contradistinction from "materials the growth or product of the Philippine Islands, or of the United States, or of both."

But that the territory ceded to the United States by the treaty with Spain is not "foreign" territory within the meaning of the tariff laws was conclusively settled by the Supreme Court of the United States in *De Lima v. Bidwell* (182 U. S. 1, 196). By the tariff act in force when the cession was made it was provided that "there shall be levied, collected, and paid upon all articles imported from foreign countries" certain duties therein specified. The question was whether certain cargoes of sugar shipped from Porto Rico were subject to duty; and the court held, as expressed in the syllabus, that "with the ratification of the treaty of peace between the United States and Spain, April 11, 1899, the island of Porto Rico ceased to be a 'foreign country' within the meaning of the tariff laws."

I am of the opinion, therefore, that said section 14 does not apply to goods manufactured in the Philippine Islands.

Respectfully,

J. A. FOWLER,
Acting Attorney-General.

The SECRETARY OF WAR.

FOREST RESERVES—ENTRY OF AGRICULTURAL LANDS.

Lands temporarily withdrawn from entry for further examination with a view to their inclusion in a definite forest reservation constitute "temporary forest reserves" within the meaning of section 1 of the act of June 11, 1906 (34 Stat. 233).

DEPARTMENT OF JUSTICE,
September 20, 1910.

SIR: Under date of August 19, 1910, you apprised me of a lack of unanimity between your department and the Department of Agriculture regarding the proper construction of the first section of the act of June 11, 1906 (34 Stat.

233), and requested my opinion on the subject. The section, so far as here material, is as follows:

“That the Secretary of Agriculture may, in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain as to the location and extent of lands within permanent or temporary forest reserves . . . which are chiefly valuable for agriculture and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves and which are not needed for public purposes, and may list and describe the same by metes and bounds or otherwise, and file the lists and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and this act.”

Specifically, as appears by your statement, the case involves an application by one L. C. Howell to enter, under this law, certain lands in California which as long ago as December 13, 1904, were temporarily withdrawn for further examination, with a view to their inclusion, wholly or in part, within a forest reserve, and which, though never so included, have not since been restored to entry under the public land laws in general. In a communication of July 13, 1910, addressed to the Secretary of Agriculture, you held, in effect, that lands so withdrawn are not subject to entry under the statute, even though they be chiefly valuable for agriculture, and even though the conditions and requirements of the statute be otherwise met. The Secretary of Agriculture, on the other hand, in correspondence submitted with your letter, maintains that such lands constitute a “temporary forest reserve” within the meaning of this law.

Plainly, in devising the legislation, Congress sought a way whereby small tracts of agricultural land, unavoidably included within large bodies set aside for forest purposes, might be settled and acquired by home seekers without subtracting from forested areas or interfering with sound forest management. I do not find that the section in any way adds to, restricts, or modifies the forest reserve policy as previously expressed. It simply recognizes the fact

that, in the process of creating the reservations, certain agricultural lands are perforce included which should be open to the homesteader, and to obviate this defect supplies a new legal mechanism whereby they may be definitely segregated from all lands that are properly required for the forest, and then entered under the homestead law by metes and bounds, if need be, without regard to the lines of the public surveys. Though fully protective of the forest policy, the act is in this respect a settlement law.

Bearing this purpose clearly in mind, in connection with the practice of withdrawing large areas tentatively (as was done in this case) in the genesis of national forests, I do not encounter grave difficulty in applying the section to the lands in question, regardless of any technical or academic criticism that may be invited by the expression "temporary forest reserves." In framing this law Congress evidently had in mind two classes of lands reserved or held for forestry purposes, which should be brought within its operation—one comprised in "permanent" reserves, the other in "temporary" reserves. As to the former, I see no reason to doubt that there were intended those definite and ultimate reservations, commonly called "forest reserves," and now designated by law as "national forests," which have been created in some few instances by direct act of Congress, but in most instances by proclamation of the President, and are subjected by law to the administrative care and control of the Secretary of Agriculture.

A legislative definition of their objects may be found in the following words of Congress:

"No public forest reservation shall be established except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes." (See act of June 4, 1897, 30 Stat. 35.)

This provision, with others *in pari materia*, might well be invoked as indicative of a desire upon the part of Congress to have reservations established as permanent instrumentalities to meet continuing necessities. There is certainly nothing in the legislation on the subject to evince an opposite intention. And while I know of no reason why the President, should he see fit to do so, might not lawfully create such a reservation to subserve a purpose merely and professedly temporary, my attention has not been directed to any instance in which the terms of the proclamation might not fairly be said to import an indefinite and therefore, presumably, a permanent duration. Out of these considerations I think it follows clearly enough that the term "permanent forest reserves" in the act of 1906 was intended to apply to the national forests, both because the application is quite appropriate and because there is and has been no other species of forest reserves to which the term could possibly be referred.

From this conclusion it necessarily results that the expression "temporary forest reserves" can not mean the national forests. It might be argued that Congress sought to anticipate a mere possibility, not presaged by experience, that the President might, at some time, create reservations for definite terms or to meet transitory needs; but this would be a strained interpretation and really an evasion of the duty to give this statute and all its parts a reasonable construction in the light of conditions as they existed when it was enacted and the mischief which it was intended to cure.

It is certainly much more reasonable to suppose that Congress had in mind the extensive withdrawals of land made from time to time as preliminaries to the creation of definite forest reservations by executive proclamation. Such withdrawals, though made by your department, in the ultimate analysis are justified by and rest upon the power vested in the President to create forest reservations. They are presumed to be made by his direction or with his assent, and, in the eye of the law, they are regarded as his acts. (See *Wilcox v. McConnell*, 13 Pet. 498, 513; *Wolsey v. Chapman*, 101 U. S. 755, 769; *Wood v.*

Beach, 156 U. S. 548, 550.) Where lands have been withdrawn for a definite purpose, I see no impropriety in saying that they are "reserved" for that purpose or in speaking of them as constituting a "reservation" for that purpose. So, the withdrawn lands referred to in your letter may be properly designated as a "reservation," since they are set aside and reserved from sale or other disposition until their availability for forest purposes shall have been determined. This reservation is also temporary, because it is intended, sooner or later, to be brought to an end, either by including the lands in another reservation, of very different legal incidents, or by restoring them to entry. To refer to it as a "forest reservation" is not particularly fortunate, in view of the previous occupation of that term by another legal and common meaning. But this is an example of inaccuracy rather than obscurity.

The conclusion that such withdrawn lands constitute the "temporary forest reserves" intended by the act is unavoidable when it is considered, first, that if they do not, the appellation must stand without a meaning, and, second, that such intention is in perfect accord with the obvious purpose of the statute. Withdrawals of this kind may remain in effect (as did the one here involved) for many years before the lands become embodied in a forest or are restored to entry; and the areas affected being designated in some haste, and with a view to further examination in the future, are even more likely to include agricultural tracts than are the forests themselves. The aim of the statute was to prevent such tracts from being needlessly withheld from homestead entry, and from this standpoint it is, of course, entirely immaterial whether the lands were merely withdrawn or definitely included in a forest reservation. The remedy provided by the statute is equally suggested by both situations, and applicable to each alike, permitting the entryman to have, by metes and bounds, the irregular agricultural parcels, while retaining for the Government the lands desirable for forest uses—a separation which in many instances could not be accomplished by the restoration and subsequent entry of the lands by legal subdivisions.

I may add that the foregoing views appear to accord with those expressed by the committee which reported this measure to the Senate. (Senate Report No. 3291, first session Fifty-ninth Congress.)

Very respectfully,

J. A. FOWLER,
Acting Attorney-General.

THE SECRETARY OF THE INTERIOR.

NAVAL OFFICERS SERVING AS BUREAU CHIEFS—RANK,
PAY, AND EMOLUMENTS.

A naval officer who served as bureau chief in the Navy Department and is eligible to retirement after thirty years' service in the Navy or Navy Department, is entitled to the rank, pay, and emoluments of a bureau chief under the act of June 24, 1910 (36 Stat. 607), during the time he remains on the active list, whether as bureau chief or otherwise. The "emoluments" of an office or place include salary, pay, and every kind of pecuniary compensation for service rendered.

DEPARTMENT OF JUSTICE,
September 27, 1910.

SIR: In your note of September 16, 1910, you call my attention to the following provision in the appropriation act of June 24, 1910 (36 Stat. 607), viz:

"The pay and allowances of chiefs of bureaus of the Navy Department shall be the highest shore-duty pay and allowances of the rear-admiral of the lower nine; and all officers of the navy who are now serving or shall hereafter serve as chief of bureau in the Navy Department and are eligible for retirement after thirty years' service, shall have, while on the active list, the rank, title, and emoluments of a chief of bureau, in the same manner as is already provided by statute law for such officers upon retirement by reason of age or length of service, and such officers, after thirty years' service, shall be entitled to and shall receive new commissions in accordance with the rank and title hereby conferred."

You ask my opinion:

"Does the language of this paragraph permit an officer who is a bureau chief in the Navy Department, and who

reaches thirty years' service and becomes thus eligible for retirement, to retain the rank, pay and emoluments of such bureau chief on the active list if he then resigns or is removed from his position of bureau chief and returns to general service?"

The provision quoted obviously refers to an officer in the Navy who is, or may hereafter be, the chief of a bureau in the Navy Department, and who, at the time when the question arises, has, after thirty years' service in the navy or Navy Department, become eligible for retirement. It assumes also that while such officer has become eligible for retirement for length of service, yet he has not been retired, but continues upon the active list of the Navy.

It plainly and certainly provides that such officer "shall have, while on the active list, the rank, title, and emoluments of a chief of bureau, in the same manner as is already provided by statute law for such officers upon retirement by reason of age or length of service."

It will be noticed that the benefits thus conferred are not at all restricted to the time during which such officer remains chief of bureau, but, on the contrary, that the officer "shall have, while on the active list, the rank, title, and emoluments" thereby conferred.

To restrict the "rank, title, and emoluments" conferred by this law to a period during which the officer remains chief of bureau would be in plain contradiction of the statute.

Then, too, if construction of any kind were permissible in this case, it might be pointed out that the interpretation here given is the only one which can give force or effect to all the language used. For, if the intention had been to confer this "rank, title, and emoluments" only during the continuance of such officer as chief of bureau, this provision as to continuance would have been quite unnecessary; for the rank, title, and emoluments would, of course, continue, unless otherwise provided by law, so long as the officer continued in such office, and the other provisions would have meant precisely the same without this clause as with it. The only possible effect of that clause is to continue, as it plainly does, such "rank, title, and emoluments"

during the time in which the officer remains on the active list of the navy, whether as bureau chief or otherwise.

But the provision is plain and unambiguous, and, therefore, construction of any kind is not permissible, but the ordinary meaning of the language used must be taken as the meaning of the provision in question.

As the "emoluments" of an office or place include salary, pay, and every kind of pecuniary compensation for service rendered (*Hoyt v. United States*, 10 How. 108, 135), the pay provided for in this provision also continues with the "rank, title, and emoluments," and your question is therefore answered in the affirmative.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

CIVIL SERVICE—ELIGIBILITY OF CARPENTER TO FILL
TEMPORARY CLERKSHIP.

The Attorney-General can not properly render an opinion to the Secretary of Commerce and Labor upon the question whether the Civil Service Commission is authorized, under existing civil-service rules, to certify eligibles from the list of persons who have qualified as carpenters, from which selection may be made for filling temporarily a statutory position as clerk, as the question is not one arising in the administration of the Department of Commerce and Labor which the Secretary is called upon to determine.

DEPARTMENT OF JUSTICE,
September 27, 1910.

SIR: I have the honor to acknowledge the receipt of your letter of the 14th instant, with inclosures, wherein you request an opinion upon the question whether the Civil-Service Commission is authorized, under existing civil-service rules, to certify eligibles from the list of persons who have qualified as carpenters, from which selection may be made for filling, temporarily, a statutory position as clerk at \$900 per annum under your department.

Your letter shows that the question has arisen in the following manner:

A vacancy in a statutory position of clerk at \$900 per annum now exists in the Bureau of Light-Houses of your

department. In another part of your office the services of a carpenter are urgently needed for a period of probably three months, and you desire to utilize the vacancy in the statutory position mentioned for the purpose of securing the services of a carpenter. Accordingly a requisition was made by you upon the Civil Service Commission for a list of eligible clerks qualified as carpenters, and the commission has advised you that the position of clerk is an educational one of the first grade, while the position of carpenter is noneducational and of the third grade, and that it could not, therefore, issue a certificate from the carpenter register for the purpose of filling your clerk vacancy. You also transmit a copy of your reply to the letter of the commission, in which you sought to have it recede from the position it had taken in the matter, and of the response of the commission, informing you that no additional facts had been submitted which would warrant it in changing its action.

Therefore you request me to review the matter and advise you whether the Civil Service Commission is authorized to comply with your request.

It is clear from your letter, and the papers which accompanied it, that the authority of the Civil Service Commission in the premises is one for its determination and can not in any sense be said to be pending before you for decision. As stated in response to a request for an opinion under similar circumstances (20 Op. 312), "the question is one which perhaps affects the administration of your department, but it is not one which you, as the head of the department, are called upon to decide in its administration."

In an opinion of August 1, 1910 (*Ante*, p. 393) concerning a difference of views arising between the Civil Service Commission and the Director of the Geological Survey as to the eligibility of a certain person for permanent appointment, the Secretary of the Interior was advised that the question presented was not one arising in the administration of his department which he was called upon to determine, and upon which an opinion could be requested by him under the provisions of section 356 of the Revised Statutes, but

was one for the determination of the commission, pursuant to the civil-service statutes and regulations. (See also 20 Op. 158.)

Should the commission entertain any doubt as to what action it is authorized to take, it may, as was done in the case of the opinion referred to by you in another connection (26 Op. 522), ask the President to call for an expression of my views.

I regret that under the circumstances the law and uniform practice of this department preclude me from responding to the question which you ask.

In accordance with your request, the papers which accompanied your letter are herewith returned.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

HUDSON RIVER—HARBOR LINES—SHOAL WATER.

The establishment of harbor lines on the Hudson River from Troy to below New Baltimore does not preclude the Government, in the prosecution of improvements in said river in the interest of commerce and navigation, from depositing the excavated material in the areas of shoal water behind and shoreward of the said lines without the consent of the owners and without making compensation.

DEPARTMENT OF JUSTICE,

September 27, 1910.

SIR: I have the honor to reply to your letter of June 30, 1910, in which you ask my opinion as to whether the existence of bulkhead or so-called "harbor" lines on the Hudson River from Troy to below New Baltimore precludes the Government in the prosecution of improvements in the river at that point, from depositing the excavated material in the areas of shoal water behind and shoreward of the said lines without the consent of the owners and without making compensation.

I am of opinion that the existence of these lines does not have this effect.

There can be no question that, prior to the delineation of said harbor lines, the Federal Government had the sovereign right, under its duty in respect to interstate commerce, to take material excavated from one portion of the bed of a river and deposit it in another portion of that bed (whether deep or shoal water); and this without the consent of the owner of the fee in the submerged soil and without compensation to him. (*Scranton v. Wheeler*, 179 U. S. 141, 163-164; *South Carolina v. Georgia*, 93 U. S. 4 at p. 11, *semble*; *Barney v. Keokuk*, 94 U. S. 324, 337-338; *Gibson v. U. S.*, 166 U. S. 269, 271; *So. Pac. Co. v. Western Pac. R. R. Co.*, 144 Fed. 160, 192-193; *Hawkins Point Light House Case*, 39 Fed. 77; *Hill v. U. S.*, 39 Fed. 172; 22 Op. 646; Cf. 27 Op. 311.)

Also it is clear that, prior to the delineation of the said harbor lines, there coexisted beside, but subject to, these rights and powers of the Federal Government, a subordinate right in the owner of the submerged soil to build bulkheads and wharves, and to fill in, up to the point at which actual navigation would be obstructed. (*Yates v. Milwaukee*, 10 Wall. 497; *Ill. Cent. R. Co. v. Ill.*, 146 U. S. 387, and below 33 Fed. 730; *Dutton v. Strong*, 1 Black. 23 (Harlan, J.); *Railroad Co. v. Schurmeir*, 7 Wall. 272.)

The question then is, what effect, if any, did the delineation of these harbor lines have upon these coexisting rights of the Government on the one hand and of the owner of the submerged soil on the other?

To determine that question it is necessary first of all to examine the act of Congress by which the lines were authorized (act Aug. 11, 1888, sec. 12; 25 Stat. 400), and which is in fact the only express statement of their meaning and intended effect. This express statement is as follows:

"SEC. 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby, authorized to cause such lines to be established, beyond which no piers or wharves shall be extended or deposits made except under such regulations as may be prescribed from time to time by him."

Clearly there is here no express language either of abdication by the Government of any of its rights and duties or of grant to the private owner of any new affirmative rights. On the contrary, the language is entirely prohibitory—fixing the point beyond which piers, wharves, or deposits must *not* go. And in the later amended form of the section, criminal punishment is provided for violation of the prohibition. (Act Sept. 19, 1890, 26 Stat. 455, sec. 12.) In short, the statutory definition of the lines, so far as its express terms go, merely announces specifically the position of the navigable channel, up to which the owner of the submerged land had, as I have stated, an already existing right to wharf or fill.

Is there, however, implied, even if not expressed, in such an announcement a positive change of rights of the parties up to this boundary so announced? I see no valid grounds for such an implication. The line was drawn in water. The river, part deep and part shallow, remained as before, and also as before there remained the public necessities for using the shallow water and its bed in the service of navigation. Nothing actually happened except that the Government, having a certain jurisdiction over the entire river, and the owners of the submerged lands having certain rights excepting in the channel, the Government designated for the information of the owners the whereabouts of that channel. It is not apparent how such a designation implies the termination of the former status of the parties up to the channel; for certainly even the implied recognition of the preexisting rights of the owners was not inconsistent with an intention also to continue the preexisting rights of the public. That these two sets of rights are not mutually exclusive is shown by their original undoubted coexistence.

While the power of dumping in the particular case to which you refer may not be itself of very high importance, the principle affecting it would necessarily also affect even the most essential uses of the stream in the public interest; and the powers and duties involved are therefore of so high a degree that they can not be deemed to have been abdicated without the most explicit language

or the most unavoidable implication. Indeed, it is doubtful if they can be abdicated at all. (*Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387.)

Of course, the question might be different if the private owner had actually filled in, thereby physically removing his land from the body of the river and making it a part of the upland. But here we have no such change; the water remains, and the soil beneath is still a part of the bed of a navigable stream.

Under such circumstances I am clearly of the opinion that so long as these physical conditions exist the Government's rights and duties, which arose from them, continue to exist.

I am confirmed in these views by a considerable body of precedent, from which I have found no dissent.

The opinion of Attorney-General Griggs that harbor lines once established could be changed (22 Op. 501) is, it seems to me, in effect an answer to your present question, because, if the delineation of harbor lines is construed to be an abdication by the Government of its governmental rights, and a corresponding acquisition by the private owner of exclusive rights, the owner could no more properly be deprived of this acquisition by a change of the line than by government action outside the line. I see no legal reason, for instance, in the present case, for supposing that the Government could acquire the right to dump in the shoal waters of the river by going through the form of a purely ex parte revocation of the bulkhead line when it could not have that right without going through that form.

In *Turner v. People's Ferry Co.* (21 Fed. 90, Circuit Court, Southern District of New York), Judge Brown carefully considered the point and reached the conclusion (pp. 94, 102, 103) that the establishment of a harbor line did not give an exclusive right to the owner of the land under water, but that the public right in the interest of navigation continued, at least until the private owner had himself filled in and reclaimed the land under water, and whether it continued even after that Judge Brown found it unnecessary to consider.

In *So. Pac. Co. v. Western Pac. Ry. Co.* (144 Fed. 160) an injunction was sought among other things to restrain the dredging company (which was acting in the improvement of a river under the authority of the Government) from dumping the dredged material into shoal water lying between the harbor line and the shore. The court held (p. 203), citing 22 Op. Atty. Gen. p. 646, *supra*, that this injunction should not be granted, as the power of Congress to improve the harbors and navigable waters "carries with it the right to deposit the material removed in making the improvements in any other part of the harbor or navigable waters or other place within its control." The court did not enter into a particular discussion of the specific question whether the establishment of the harbor lines affected this right, but the question was involved in the facts of the case.

In the *Hawkins Point Light House Case* (*Chappell v. Waterworth*), 39 Fed. 77, it was similarly held that the Government had the power to build a light-house in shoal water without compensation to the owner of the submerged soil. Here again, in fact, lines had been established, but neither counsel nor the court appear to have supposed that that would affect the question.

The state courts have uniformly held that the establishment by States and municipalities of harbor lines similar to those established in this case by the Federal Government, does not oust the sovereign (in these cases the State), at least until the land has been actually reclaimed. This view is held not only in those cases where the establishment of the lines is construed to be a mere revocable license (*Rhode Island Motor Co. v. City of Providence*, 55 Atl. 696; *Stevens v. Paterson, &c. R. Co.*, 34 N. J. L. 532; *Turner v. City of Mobile*, 135 Ala. 73, 129; *People v. Williams*, 64 Cal. 498; *Eisenbach v. Hatfield*, 2 Wash. St. 236; *Lane v. Board of Harbor Commrs.*, 70 Conn. 685), but also in those cases in which the lines are deemed to recognize a transferrable property right. (*Boston & Hingham Co. v. Munson*, 117 Mass. 34; *Miller v. Mendenhall*, 43 Minn. 95, 101; *Hanford v. St. Paul & Duluth R. Co.*, 43 Minn. 104; *Bradshaw v.*

Duluth Imp. Mill Co., 52 Minn. 59, p. 65; *Rumsey v. N. Y. & N. E. R. R. Co.*, 133 N. Y. 79, 89.) I have not lost sight of the fact that in these cases the actual title to the soil under water was in the State itself, but the decisions do not rest upon that fact so much as upon the sovereign control of the State over navigation, and I do not think they are validly to be distinguished from the situation which your question presents.

Incidentally it is difficult to imagine how the dumping of soil in the shoal waters in question could be of any actual injury to the owners whose own rights are substantially limited to such reclamation. (*So. Pac. Co. v. West. Pac. Co.*, *supra.*)

I am of opinion, therefore, as above stated, that the shoal waters of a river may still be made to serve the purposes of navigation notwithstanding the delineation of the harbor lines.

Very respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF WAR.

CONTRACT FOR SUPPLIES FOR THE DISTRICT OF COLUMBIA—THE SECRETARY OF THE TREASURY.

The Secretary of the Treasury can not legally enter into a contract for furnishing supplies for the use of the government of the District of Columbia.

Section 4 of the legislative, executive, and judicial appropriation act of June 17, 1910 (36 Stat. 531), is not applicable to the government of the District of Columbia.

DEPARTMENT OF JUSTICE,

September 29, 1910.

SIR: I have the honor to acknowledge receipt of your communication of August 30, in which you ask my opinion as to whether, under section 4 of the act of June 17, 1910 (36 Stat. 531), the Secretary of the Treasury can legally enter into a contract for furnishing supplies for the use of the government of the District of Columbia.

Before quoting the statute and expressing an opinion in reply to the inquiry, a brief review of the legislation on

the subject will assist in the solution of the question. By section 3709 of the Revised Statutes it was enacted as follows:

"All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. * * *"

This section was amended by the act of January 27, 1894 (28 Stat. 33), by adding at the end thereof the following provision:

"And the advertisement for such proposals shall be made by all the executive departments, including the Department of Labor, the United States Fish Commission, the Interstate Commerce Commission, the Smithsonian Institution, the Government Printing Office, *the government of the District of Columbia*, and the superintendent of the State, War and Navy building, except for paper and materials for use of the Government Printing Office, and materials used in the work of the Bureau of Engraving and Printing, which shall continue to be advertised for and purchased as now provided for by law, on the same days and shall each designate two o'clock post meridian of such days for the opening of all such proposals in each department and *other government establishment in the city of Washington*; and the Secretary of the Treasury shall designate the day or days in each year for the opening of such proposals and give due notice thereof to the other Departments and *Government establishments*. Such proposals shall be opened in the usual way and schedules thereof duly prepared and, together with the statement of the proposed action of each Department and *Government establishment* thereon, shall be submitted to a board, consisting of one of the Assistant Secretaries of the Treasury and Interior Department and one of the Assistant Postmasters-General, who shall be designated by the heads of said Departments and the Postmaster-General, respectively, at a meeting to be called by the official of the Treasury Department, who shall be chairman thereof, and said board shall carefully

examine and compare all the proposals so submitted and recommend the acceptance or rejection of any or all of said proposals. And if any or all of such proposals shall be rejected, advertisements for proposals shall again be invited and proceeded with in the same manner."

By section 2 of the act of April 21, 1894 (28 Stat. 62), the said act of January 27, 1894, was so amended—

"that the provisions thereof shall apply only to advertisements for proposals for fuel, ice, stationery, and other miscellaneous supplies to be purchased at Washington for the use of the Executive Departments and other Government establishments therein named."

Under this legislation, therefore, all contracts for supplies or services in any of the departments of the General Government, except for personal services, wherever to be delivered or performed, were required to be made after advertising for proposals, unless the public exigency should otherwise require; while purchases of fuel, ice, stationery, and other miscellaneous supplies at Washington for the use of the executive departments of the General Government and the other governmental establishments in the city of Washington named in the act of January 27, 1894, including by specific enumeration the government of the District of Columbia, were required to be made after previous advertisement for proposals, to be opened on a day designated by the Secretary of the Treasury, and after the proposals should have been submitted to the board created by that act for its recommendations.

This legislation did not attempt to interfere with the powers and duties conferred by other statutes upon the heads of departments and bureaus with respect to the making of actual contracts for the purchase of supplies or the rendition of services, but merely regulated the method of obtaining proposals, and secured to each department and every branch of the Government mentioned in the act, the benefit of the recommendations of the board created by the act of 1894.

By Executive Order No. 1071, President Taft, on May 13, 1909, "in order to systematize the purchase of supplies needed in common by two or more of the several depart-

ments and government establishments hereinafter mentioned, to secure such supplies at lower and uniform prices, and to more effectually carry out the spirit of the act of January 27, 1894, chapter 22 of the Fifty-third Congress," created a general supply committee, composed of one representative from each of the departments and one from each of the government establishments specified in the act of January 27, 1894, including the government of the District of Columbia, which committee was required to adopt and carry out plans already formulated for the purchase of supplies for the ensuing fiscal year, and thereafter to prepare one general schedule of all supplies needed in common by any two or more of the departments and establishments, and also articles of a special nature required by one department or establishment, when requested to do so by the head of such department or establishment; provided for uniform proposals for supplies and bonds to secure the performance of an accepted proposal, and required the committee to formulate a uniform method of inspection and testing of all supplies delivered to the Government to be used by all of the departments and establishments, as a basis of acceptance or rejection of supplies, etc. The order provided that—

"while the members of said board shall advise together collectively, yet each member shall in performing the several acts hereinafter directed, act as a separate agent and representative of the particular department or establishment from which he is appointed."

Immediately upon the promulgation of this order, the government of the District of Columbia made protest against it, and requested that it be eliminated from its requirements, and, after a consideration of the subject, the President, on June 16, 1909, issued Executive Order 1088, modifying the foregoing Executive Order No. 1071, so "as to exclude therefrom the name of the government of the District of Columbia," and directed that "the provisions of said order shall in no respect apply to said District."

The act "making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal

year ending June thirtieth, nineteen hundred and eleven, and for other purposes," approved June 17, 1910, chapter 297 (36 Stat. 468), after making appropriations for the legislative, executive, and judicial expenses of the general government, enacted as follows:

"SEC. 4. That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other government establishments in Washington when the public exigencies do not require the immediate delivery of the article, shall be advertised and contracted for by the Secretary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be a general supply committee in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the heads thereof, the duties of which committee shall be to make, under the direction of the said Secretary, an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties, and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may see fit to call upon, who shall render whatever assistance they may require. The committee shall aid said Secretary in securing the proper fulfilment of the contracts for such supplies, for which purpose the said Secretary shall prescribe, and all departments comply with, rules providing for such examination and tests of the articles received as may be necessary for such purpose; in making additions to such schedules; in opening and considering the bids, and shall perform such other similar duties as he may assign to them: *Provided*, That the articles intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments; but the said Secretary shall have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased. In all cases only one bond for the proper performance of each

contract shall be required, notwithstanding that supplies for more than one department or government establishment are included in such contract. Every purchase or drawing of such supplies from the contractor shall be immediately reported to said committee. No disbursing officer shall be a member of such committee. No department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department: *And provided further*, That telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him."

By section 5—
"all laws or parts of laws inconsistent with this act are repealed."

The commissioners of the District of Columbia have raised the question whether the above mentioned section 4 of the act of June 17, 1910, applies to the government of the District of Columbia, and whether or not the Secretary of the Treasury is by that act authorized and empowered to contract for the purchase of "supplies of fuel, ice, stationery and other miscellaneous supplies" for the government of the District of Columbia, "when the public exigencies do not require the immediate delivery of the article."

In my opinion, the section under consideration does not apply to purchases made for the government of the District of Columbia. It is, of course, indisputable, that the previous legislation was made applicable to the government of the District of Columbia. This was, however, done by the express enumeration in the act of Congress of the government of the District of Columbia as one of the government establishments to which the act of 1894 was made applicable; but the legislation of 1910 does not designate the government of the District of Columbia as one of the government establishments in Washington to which section 4 of that act is made applicable, and the very radical change in the method of contracting for supplies introduced

by the act of 1910 would seem to indicate that if Congress had intended to include the government of the District of Columbia among the public agencies to which the legislation was to be applicable, it would have expressly so specified.

The new act is not merely a modification or amendment of, but is a substitute for the preexisting law on the subject. It provides for the creation of "a general supply committee *in lieu* of the board provided for in section thirty-seven hundred and nine of the Revised Statutes, as amended, composed of officers, one from each such Department, designated by the heads thereof," the duties of which committee are to make, under the direction of the Secretary of the Treasury, an annual schedule of supplies to aid the Secretary in soliciting bids with respect to which, when awards are made, the Secretary of the Treasury is to contract to purchase for the Government. The board created by the act of 1894 was for the purpose of advising the respective heads of the different branches of the Government mentioned in that act, concerning the acceptance or rejection by the heads of such respective departments or offices, of the proposals made for the purchase by them, respectively, of materials for which they were respectively to contract, pursuant to the powers vested in them by law. In introducing the new system by the act of 1910, Congress very properly and logically might provide, as it has done, for the making of contracts by the Secretary of the Treasury, instead of by the heads of the several executive department bureaus and other government establishments in Washington, which are agencies of the General Government, because payment pursuant to all of such contracts would be made out of the General Treasury of the United States, and it is merely a matter of routine organization and system whether the contract be made by the Secretary of the Treasury or by the heads of the respective departments and establishments, and in establishing a system for the purpose of enabling the General Government to secure uniform quality and the lowest price, it is in the interest of good organization that the contract should be made by one official for the Government, and that the supplies should

be furnished to and distributed from one common center. The same reasoning does not, however, apply to the District of Columbia. The District is a municipal corporation, of which the commissioners provided for in the act creating a permanent form of government for the District are officers. (See act June 11, 1878, 20 Stat. 102, sec. 1; *Kerr v. Ross*, 5 App. D. C. 241; *U. S. ex rel. Daly v. Macfarland*, 28 App. D. C. 552; *Capital Traction Co. v. Hof*, 174 U. S. 1.)

The said act requires the commissioners to submit their annual estimates to the Secretary of the Treasury, and after consideration and approval thereof by him that they be by the commissioners transmitted to Congress, and—

“To the extent to which Congress shall approve of said estimates, Congress shall appropriate the amount of fifty per centum thereof; and the remaining fifty per centum of such approved estimates shall be levied and assessed upon the taxable property and privileges in said District, other than the property of the United States and of the District of Columbia.”

The commissioners are furthermore expressly empowered, subject to the limitations and provisions contained in the act—

“to apply the taxes or other revenues of said district to the payment of the current expenses thereof * * *.”

In conformity with this system of dividing the expenses of the District government, Congress at the same session at which the act of June 17, 1910, under consideration, was passed, enacted the usual annual act “making appropriations to provide for the expenses of the government of the District of Columbia, for the fiscal year ending June thirtieth, nineteen hundred and eleven” (36 Stat. 374), by which it enacted—

“that the half of the following sums named, respectively, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, and the other half out of the revenues of the District of Columbia, in full for the purposes following, being for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and eleven, namely:”

Among the items for which appropriation is thus made are specifically enumerated some of the very same items enumerated in the act of June 17, 1910, above referred to, viz:

"For fuel * * * and miscellaneous supplies" (p. 375).

"For contingent expenses of the government of the District of Columbia, namely: For printing, checks, books, law books, books of reference, and periodicals, stationery * * *" (p. 380).

"For fuel * * * 'for the public schools'" (p. 396).

"For contingent expenses * * * stationery, printing, ice" for the public schools (p. 396).

"For fuel 'for the Metropolitan Police'" (p. 399) etc.

It would certainly be an anomaly if all purchases of fuel, ice, stationery, and other miscellaneous supplies for the use of the different branches of the government of the District of Columbia, one half of which are by law required to be paid for out of the Treasury of the United States and the other half from the revenues of the District of Columbia, raised by taxation and license fees, should be required by Congress to be contracted for by the Secretary of the Treasury of the United States, and unless the language of the statute renders absolutely necessary such a construction the obvious inconvenience of such interpretation should forbid it. It is a canon of construction that all statutes should receive a reasonable interpretation if the meaning is at all doubtful and that where great inconvenience will result from a particular construction, that construction is to be avoided unless the meaning of the legislation plainly requires it.

In my opinion, the manifest inconvenience from giving to the act of June 17, 1910, an interpretation which would require the Secretary of the Treasury to make contracts for supplies of fuel, ice, stationery, and other miscellaneous items to be used by the different departments of the government of the District of Columbia forbids such construction to be placed upon the statute unless its language is so clear and specific that no other construction can be fairly placed upon it. It will be observed, however, that the statute does not mention the government of the District of

Columbia among those departments of government establishments in Washington to which the act is by its terms made applicable. In this respect it differs from the previous law on the subject, and this difference is accounted for by the radical difference introduced by the new legislation in the system inaugurated by it. Certainly, in the absence of some other evidence of congressional intent, the use in the act making appropriations for the legislative, executive, and judicial expenses of the General Government of the words "the executive departments and other government establishments in Washington" would not naturally be taken to include a municipal corporation created by Congress for the government of the District of Columbia and the various branches and establishments of that municipal government.

Some light upon the legislative intent may also be derived from a consideration of the fact that in the District appropriation act of May 18, 1910, after making appropriations for the purchase and maintenance of motor vehicles, it is enacted:

"Section four of the legislative, executive, and judicial appropriation Act, approved February third, nineteen hundred and five, shall apply to carriages, motor, and other vehicles owned by and used in the several branches of the government of the District of Columbia." (36 Stat. 381.)

"No part of any money appropriated by this or any other Act shall be used for purchasing, maintaining, driving or operating any carriage or vehicle (other than those for the use of the President * * *) for the personal or official use of any officer or employee of any of the executive departments or other government establishments at Washington, District of Columbia." (33 Stat. 687.)

If, in the understanding of the Sixty-first Congress, the words "other government establishments at Washington" embraced the government of the District of Columbia, it would have been entirely unnecessary to have specifically enacted, as was done in the District appropriation act, that the section last above quoted should apply to vehicles owned by and used in the several branches of the government of the District of Columbia, and the specific enactment deemed necessary by Congress for the purpose of applying

the provisions of the act of 1905 to vehicles owned by and used in different branches of the government in the District of Columbia affords a confirmation of the opinion that in employing the same language, viz: "the executive departments and other government establishments in Washington," in section 4 of the act of June 17, 1910, the Congress did not intend to refer to the government of the District of Columbia or the several branches thereof.

For these reasons I am of the opinion that the Secretary of the Treasury can not legally enter into a contract for furnishing supplies for the use of the government of the District of Columbia and that the provisions of section 4 of the legislative, executive, and judicial appropriation act approved June 17, 1910, are not applicable to the government of the District of Columbia.

Respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

ALASKAN COAL LANDS—PAYMENT OF PURCHASE PRICE
BY ENTRYMAN PENDING A PROTEST.

The payment required by section 2 of the act of April 28, 1904 (33 Stat. 525), to be made by locators of Alaska coal lands, as a condition precedent to patent therefor, need not be made, in cases where protest is filed, until after the termination of the protest.

DEPARTMENT OF JUSTICE,

October 18, 1910.

SIR: I am in receipt of your letter of October 10th advising me that under the act of April 28, 1904 (33 Stat. 525), it becomes necessary in order to secure a patent for coal lands in the District of Alaska that the locator of such lands, or his assign present an application therefor within three years from the date of his location, accompanying his application by a certified copy of the plat of survey and the field notes thereof; and that it is also necessary that he make payment for the lands in the sum of \$10 per acre; that upon the filing of such application the applicant is required to post and publish a notice of

NOTE.—Opinion of October 5, 1910, to the Secretary of State, may appear in a later volume.

his application for a period of sixty days, and to furnish proof thereof; that during the period of publication, or within six months thereafter, adverse claims may be filed, upon which an action to quiet title must be begun within sixty days after the filing, and in such event, no patent shall issue until the final adjudication of the rights of the parties, and then only in conformity with the final decree.

You call my attention also to regulations issued by your department on July 18, 1894 (33 L. D. 114), shortly after the passage of the act of Congress above referred to, which provided, among other things, that—

“Not earlier than six months after the expiration of the period of publication, if no objections are interposed or adverse claim filed, entry may be allowed upon payment of the price per acre specified by the act.”

You further state that in the uniform administration of this law, as well as of the general mining law, after which this law of 1904 appears to have been patterned, payment of the purchase price has not been required at the time of filing the application for patent, nor until a fixed time after the expiration of the period of publication, and, in the event of the filing of objections, or of an adverse claim, not until a fixed time after the termination of proceedings thereupon. You say that, in many instances, protests under departmental regulations have been filed, in order that coal claims within the District of Alaska may be investigated, but that the agent who has filed the protest has not been prepared to file definite charges, and that the six-months period established under the departmental regulations for the payment of the purchase price following the expiration of the period of publication will shortly expire in a number of cases wherein protests have been filed by government agents; and that the question has therefore arisen as to whether the claimant, under the law and the departmental regulations, is required to make his payment before the proceedings under the Government's protest have terminated.

The regulations cited clearly do not require payment of the price per acre, specified by the act, to be made at any

definite time. It is "not *earlier* than six months after the expiration of the period of publication" that payment is required to be made, where no objections are interposed, and the revised regulations of April 12, 1907 (35 L. D. 673), provide that in case of the filing of an adverse claim within the time prescribed by the statute—

"all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notice and plat and filing the necessary proof thereof, until final adjudication of the rights of the parties."

I take it that the real question which you desire to present is whether or not the statute itself, independently of the regulations, requires payment to be made prior to the termination of the contest over the entry. Mr. Assistant Attorney-General Lawler, in an opinion which you transmit to me with your letter, discusses very fully the question whether or not such payment is required by the regulations to be made prior to the termination of a contest over a disputed entry, reaching the conclusion that it is not so required. For the reasons stated by him I entirely concur in his conclusion that the time covered by any actual suspension of the Alaskan coal land application under any form of proceeding, including a field service report or protest, pursuant to instructions either of April 24, 1907, or May 16, 1907, *supra*, during which period final entry can not properly be allowed, should not be charged against an applicant as a part of the six-months period prescribed for the submission of proof and the making of payment by your instructions of June 27, 1908, cited in his opinion. It appears unnecessary to add anything to Mr. Lawler's discussion of the subject, except to observe that he deals in his opinion principally with a construction of the various regulations promulgated by the General Land Office from time to time and lays little stress upon the provisions of the act of Congress.

Section 2 of the act of April 28, 1904 (33 Stat. 525), is as follows:

"SEC. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a

patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor-general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal land laws: *Provided*, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district."

Looking at the structure of this section, there can be no question that a payment of the sum of \$10 per acre for the lands applied for is a condition precedent to patent. But the act is ambiguous, to say the least, with respect to the time of payment. It enacts that the locator "shall receive a patent to the lands located by presenting * * * to the register and receiver * * * an application therefor, accompanied by a certified copy of plat of survey and field notes thereof, made by * * * and a payment of the sum of ten dollars per acre for the lands applied for." Undoubtedly the application must be *accompanied* by a certified copy of a plat of survey and field notes. The words "and a payment" do not naturally refer back to the words "accompanied by" as their antecedent. The natural antecedents of the word pay-

ment are "shall receive a patent," the preposition "upon" being implied before the word payment. That is to say that the patent shall issue upon application accompanied by a certified copy of plat of survey and field notes and upon payment of the sum of \$10 per acre. A different construction would make the statute read the locator shall receive a patent by presenting an application accompanied by certified copy of plat of survey and field notes and by presenting payment, etc.

But even conceding that the statute means that the application shall be accompanied by payment of the sum of \$10, it readily yields to the view that although the provisions for application, certified copy of plat, etc., and payment are *mandatory*, the *time* for payment of the sum named is *directory* only. It is particularly this class of statutes, i. e., those defining procedure by public officers, that are more apt to be held directory than mandatory.

"Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; *and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes the substantial purposes of the statute.*" (Sutherland on Statutory Construction, sec. 447.)

"Provisions regulating the duties of public officers and specifying the time for their performance are in that regard generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards. In other words, as the cases universally hold, a statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered as a limitation of the power of the officer." (*Id.* sec. 448.)

Mr. Endlich (On the Interpretation of Statutes), at paragraph 437, says:

"In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves, unless a contrary intention can be clearly gathered from the statutes construed in the light of other rules of interpretation."

"In other words, unless a fair consideration of the statute shows that the legislature intended compliance with the provision in relation to the manner to be essential to the validity of the proceeding, it is to be regarded as directory merely." (*Jones v. State*, 1 Kan. 273, 279.)

The cases concerning the point of time at which an act is to be performed, whether by the public officer himself or by some private person with an obligation upon the part of the public officer to see that it is performed, establish that as a general rule the conditions of the statute must be met at such a time as is sufficient to fairly accomplish the purposes of the act. (See *People v. Cook*, 14 Barb. 259, 290.) The practical considerations pointed out by Mr. Lawler seem to me to be more than sufficient to require the application of this principle of construction to the question under consideration.

To hold otherwise would be practically to forfeit the payment in case the contest resulted in withholding patent. Such a result is abhorrent to justice. A penalty must be expressly imposed and can never be extended by implication. (*Elliott v. East Pa. R. Co.*, 99 U. S. 573.) The timber and stone act of June 3, 1878 (20 Stat. 89), provides for a forfeiture of the money paid in case of false swearing in the application. No such provision is found in the Alaska coal act. It is true that in the case of *United States v. Trinidad Coal and Coking Co.* (137 U. S. 160), Mr. Justice Harlan held that where the Government sues to annul patents fraudulently obtained under the general coal-land act, a tender of the purchase price is unnecessary. The same was held in *United States v. Minor* (114 U. S. 233), as to a preemption claim of agricultural lands. In

the first-named case Mr. Justice Harlan suggested an appropriation by Congress, and out of that suggestion arises the real reason why the tender need not, in fact can not, be made, for after money is paid into the United States it can not be withdrawn except by force of statutory authority. "No money shall be drawn from the Treasury, but in consequence of appropriations made by law." (Constitution, Art. I, sec. 9, cl. 7.)

The constitution of the State of Texas contains exactly the same provision, and in *Texas v. Snyder* (66 Tex. 687), it was held that in an action by the State to recover school lands fraudulently obtained, this constitutional provision precluded a tender of the purchase price.

The general coal-land laws, sections 2347-2351, Revised Statutes, provide that the applicant "shall, upon application to the register of the proper land office, have the right to enter, * * * one hundred and sixty acres * * *, upon payment to the receiver of not less than ten dollars per acre * * *." There is no requirement here that the payment shall accompany the application. There is nothing to indicate that Congress intended more in this regard in the Alaska statute than in the general law. Of course, it is necessary that the copy of plat of survey and the field notes accompany the application, for without them the Land Office could not proceed to entertain the application for entry; but no such reason applies to the money payment.

The suspension of the limitation as to the time of payment by a contest or protest would appear to be but common justice. Mr. Lawler has pointed out the practical reasons for this and nothing need be added on that point, except to say that the case of the *Menasha Woodenware Co. v. The Secretary of the Interior*, in the supreme court of the District of Columbia, and which is referred to by Mr. Lawler in his opinion, involved the proviso to section 7 of the act of March 3, 1891 (26 Stat. 1095), which provides that the Secretary of the Interior shall issue patents within two years after the issuance of the receiver's receipt in certain classes of entry not including coal lands, provided no "contest" or "protest" is pending. In the *Menasha* case Jus-

tice Stafford held that a mere charge of fraud or other irregularity by a special agent is a "protest" within the meaning of this statute. Until such a "protest" is withdrawn or sustained no payment should, in common fairness, be required of the entryman unless clearly required by law to be made, and such clear requirement in my opinion is not contained in the Alaska coal act.

For these reasons I concur in the opinion expressed by Mr. Lawler that payment is not required to be made by an entryman under the act of April 28, 1904 (33 Stat. 525), until the termination of the protest.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE INTERIOR.

PURE FOOD LAW—CANADIAN CLUB WHISKY—LABEL—
BLEND.

"Canadian Club Whisky," which is the name of a whisky composed of two separate and distinct distillates of grain, is such a distinctive name and is so arbitrary and fanciful as to clearly distinguish it from all other whisky or similar product and need not be labeled "a blend of whiskies" under the provisions of section 8 of the food and drugs act of June 30, 1906 (34 Stat. 768).

A "distinctive name," within the meaning of section 8 (34 Stat. 768), is not limited to designations that are purely arbitrary or fanciful and which do not contain the names of the elements of which the compound is composed.

DEPARTMENT OF JUSTICE,

October 19, 1910.

SIR: I have received your letter of July 28, 1910, in which you submit to me the following question of law for my opinion:

"Is 'Canadian Club Whisky' such a distinctive name, under the provisions of section 8, paragraphs 10 and 11, of the food and drugs act of June 30, 1906 (34 Stat. 768), as to relieve a mixture of two separate and distinct distillates of grain from the requirement of being labeled 'A Blend of Whiskies' under section 8, paragraph 12, of the same act?"

Your letter informs me that:

"'Canadian Club Whisky' is a mixture of grain distillates, duly aged after mixing, without further admix-

ture, and reaches the consumer at 90 degrees proof. It is a particular kind and brand of whiskies made by Hiram Walker & Sons, Ltd., at Walkerville, Ontario, and is now, and has been for years, known and sold under the name 'Canadian Club Whisky.' It is known by that name and no other to the trade and consumers in the United States and other countries, and no other whisky is known by that name. The Department of Agriculture," you advise me, "claims that the product is required to be labeled 'A Blend of Whiskies,' under the law as interpreted in Food Inspection Decision 113. The distillers contend that 'Canadian Club Whisky,' under section 8 of the food and drugs act, is such a distinctive name as is there described, and, therefore, that the product is not required to be labeled as a blend."

By arrangement between your department and Messrs. Hiram Walker & Sons (Limited), briefs were submitted to me by the solicitor of your department and the counsel for Messrs. Hiram Walker & Sons, respectively, in support of their respective contentions; and I have also had the assistance of oral argument by such solicitor and counsel.

By executive order dated April 8, 1909, the President referred to the Solicitor-General of the United States certain questions, including, among others:

"I. What was the article called whisky as known (1) to the manufacturers, (2) to the trade, and (3) to the consumers at and prior to the date of the passage of the pure food law?

"II. What did the term whisky include?"

The Solicitor-General took a voluminous amount of testimony and heard the argument of parties appearing before him, and reported to the President, on May 24, 1909, among other things, that:

"(1) The article called whisky as known to the manufacturers at and prior to the date of the passage of the pure food law was—

"(a) What is often spoken of as 'straight whisky, made from grain.

"(b) Also, what is often spoken of as 'rectified whisky, made from grain, when not a mere neutral spirit, as

described in section (d) below, of the answers to this question I.

"(c) Also, a mixture of straight whiskies, or of rectified whiskies, or of straight whisky and rectified whisky or of straight whisky and what is often known as neutral spirit (made from grain), or of rectified whisky and such neutral spirit (made from grain), or of straight whisky, rectified whisky, and such neutral spirit (made from grain), if in the particular case the mixture satisfied the description of whisky given below in answer to question II" (Proceedings, etc., p. 1245). * * *

"The article called whisky as known to the consumers * * * was—

"(a) What is often spoken of as 'straight whisky,' made from grain.

"(b) Also, what is often spoken of as 'rectified whisky' if conforming to the description of whisky given below in answer to question II.

"(c) Also, a mixture of straight whiskies, or of rectified whiskies, or of straight whisky and rectified whisky, or of straight whisky and what is often known as neutral spirit (made from grain), or of rectified whisky and such neutral spirit (made from grain), or of straight whisky, rectified whisky, and such neutral spirit (made from grain), if in the particular case the mixture satisfied the description of whisky given below in answer to question II."

In answer to the question "What did the term whisky include?" he reported as follows:

"The term 'whisky' included, both at and prior to the date of the passage of the pure-food law, and has since included, the spirituous liquor composed of (1) alcohol derived by distillation from grain; (2) a substantial amount of by-products (often spoken of as congeners) likewise derived by distillation from grain and giving a distinctive flavor and properties; (3) water sufficient, without unreasonable dilution, to make the article potable; and (4) in some cases—though such addition is not essential—harmless coloring or flavoring matter, or both, in amount not materially affecting other qualities of whisky than its color or flavor.

"A mixture of two or more articles, being each a whisky within the foregoing description, was at and prior to the date of passage of the pure-food law, and has since been, whisky. A mixture of one or more whiskies, being each whisky within the foregoing description, with alcohol or a neutral spirit—being an article different from whisky through lack of a substantial amount of by-products derived by distillation from grain, and giving distinctive flavor and properties—is whisky, if the alcohol or neutral spirit is derived by distillation from grain, and if the mixture still conforms to the above general description of whisky; and so it was at and prior to the date of passage of the pure-food law." (Proceedings, etc., p. 1246.)

Upon exceptions to this report, the decision of the Solicitor-General was reviewed by the President, who differed with him only in that he thought the Solicitor-General had fallen into the error of—

"making too nice a distinction in reference to the amount of congeneric substances or traces of fusel oil required to constitute whisky for practical purposes when the flavor and color of all whiskies but straight whiskies have been chiefly that of ethyl alcohol and burnt sugar."

And the President held:

"After an examination of all the evidence it seems to me overwhelmingly established that for a hundred years the term 'whisky' in the trade and among the customers has included all potable liquor distilled from grain; that the straight whisky is, as compared with the whisky made by rectification or redistillation and flavoring and coloring matter, a subsequent improvement, and that therefore it is a perversion of the pure-food act to attempt now to limit the meaning of the term 'whisky' to that which modern manufacture and taste have made the most desirable variety."

"It is undoubtedly true," the President said, "that the liquor trade has been disgracefully full of frauds upon the public by false labels; but these frauds did not consist in palming off something which was not whisky as whisky, but in palming one kind of whisky as another and better kind of whisky. Whisky made of rectified or redistilled or neu-

tral spirits and given a color and flavor by burnt sugar, made in a few days, was often branded as bourbon or rye straight whisky. The way to remedy this evil is not to attempt to change the meaning and scope of the term 'whisky,' accorded to it for one hundred years, and narrow it to include only straight whisky; and there is nothing in the pure-food law that warrants the inference of such an intention by Congress."

Following the decision of the President the Secretaries of the Treasury, Agriculture, and Commerce and Labor prepared and promulgated a regulation, under the food and drugs act, known as "Food Inspection Decision No. 113," the portions of which material to this opinion are as follows:

"Under the food and drugs act of June 30, 1906, all unmixed distilled spirits from grain, colored and flavored with harmless color and flavor in the customary ways, either by the charred barrel process, or by the addition of caramel and harmless flavor, if of potable strength and not less than 80° proof, are entitled to the name of whisky without qualification. * * *

"Whiskies of the same or different kinds, i. e., straight whisky, rectified whisky, redistilled whisky, and neutral spirits whisky, are like substances, and mixtures of such whiskies, with or without harmless color or flavor, used for purposes of coloring and flavoring only, are blends under the law and must be so labeled."

This ruling would require "Canadian Club Whisky" to be sold under a label stating it to be "A Blend of Whiskies" unless, as claimed by the manufacturers, "Canadian Club Whisky" is its own distinctive name within the meaning of section 8 of the pure-food law.

That section prohibits the misbranding of all articles of food (which include drink), and specifies that the term "misbranded" shall apply to all articles the package or label of which shall bear any statement, design, or device regarding the article or ingredients contained therein which shall be false or misleading in any particular; that the article shall also be deemed misbranded—

"If it be labeled or branded so as to deceive or mislead the purchaser. * * *

"If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article. * * *

"Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale * * *."

It is conceded that the requirements in paragraphs first and second, above cited, are alternative, and that a mixture or compound which may be sold under its own distinctive name, pursuant to the provisions of the first paragraph, need not be marked as a "compound," "imitation," or "blend," under the provisions of the second paragraph. Canadian Club Whisky is, you say, entirely "a mixture of grain distillates, duly aged after mixing, without further admixture * * *." It is, therefore, a mixture of two whiskies, as under the President's decision the term "whisky" in the trade and among customers includes all potable liquor distilled from grain. Being a mixture of whiskies, it is distinguished from all other whiskies by the name "Canadian Club."

Regulation 20 of the "Rules and regulations for the enforcement of the food and drugs act," promulgated by the three Secretaries under date of October 17, 1906, and published as Circular No. 21 of the office of the Secretary of Agriculture, reads as follows:

"(a) A 'distinctive name' is a trade, arbitrary, or fancy name which clearly distinguishes a food product, mixture,

or compound from any other food product, mixture, or compound.

“(b) A distinctive name shall not be one representing any single constituent of a mixture or compound.

“(c) A distinctive name shall not misrepresent any property or quality of a mixture or compound.

“(d) A distinctive name shall give no false indications of origin, character, or place of manufacture, nor lead the purchaser to suppose that it is any other food or drug product.”

Applying this definition, it will be seen—

(1) That “Canadian Club Whisky” is a trade or arbitrary name which clearly distinguishes the particular mixture of whiskies so designated from any other whisky or mixture of whiskies.

(2) This distinctive name “Canadian Club Whisky” is not one representing any single constituent of the mixture, because the word whisky applies to *both* of the component elements of the mixture, and to each of them.

(3) The name “Canadian Club Whisky” does not misrepresent any property or quality of the mixture, because within the President's definition each of the elements of the mixture is whisky, and the resultant mixture is whisky.

(4) The name “Canadian Club Whisky” gives no false indication of the origin, character, or place of manufacture, because the mixture in fact is made in Canada; nor does it lead the purchaser to suppose that it is any other food or drug product, as it clearly asserts that it is whisky—which is the fact—and in your letter it is stated that it is known by that name and no other to the trade and consumers in the United States and other countries, and no other whisky is known by that name. “Canadian Club Whisky” is therefore the distinctive name of a whisky so called; that name distinguishes the product to which it is attached from all other whiskies, and clearly identifies it as the particular kind and brand of whiskies made by Hiram Walker & Sons (Limited), at Walkerville, Ontario. The name distinguishes the particular goods in relation to

which it is used from other goods of a like character belonging to other people (Hopkins on Unfair Trade, section 2). It is certainly as distinctive as the designation "S. N. Pike's Magnolia Whiskey" which, in *Kidd v. Johnson* (100 U. S. p. 617), was held to constitute a trade-mark, because distinguishing the whisky of the manufacture of S. N. Pike & Co., and their successors in Cincinnati, from all other whisky.

The brief of the Solicitor of the Department of Agriculture contends that the distinctive name under which a mixture or compound may be sold must in its entirety be purely arbitrary or fanciful, and must not contain the name of the component elements of the compound. A mixture of wheat and barley, he concedes, might be sold as "Force" or "Vita," without stating of what elements it was composed, but a mixture of two kinds of barley could not be sold as "Melrose barley" without stating that it was "a blend of barleys." It seems to me that such a construction of the term "distinctive name" is not only unwarranted, but undesirable. The two main purposes which the pure food law was designated to accomplish are, first, to prevent the sale of adulterated foods, and, second, to prevent deception being practiced on the public. It would seem to me that the latter purpose is more apt to be secured by permitting the sale of a product under its own name qualified by some distinguishing characterization, than by requiring it to be masked in an anonymity which would give no clue to any of its component elements.

But without entering into an analysis of the many decisions cited in the briefs of the respective parties, or further pursuing a discussion of the question, it appears to me clear that the name "Canadian Club Whisky" is a distinctive name, so arbitrary, and so fanciful, as to clearly distinguish it from all other kinds of whisky or other things, and a name which, by common use, has come to mean a substance clearly distinguishable by the public from everything else (See *United States v. 300 Cases of Mapleine*,* per Sanborn, D. J.; Notice of Judgment 163, Food and Drugs Act, p. 3). In my opinion, therefore, it

* NOTE.—Not officially reported.

is not necessary that the label under which "Canadian Club Whisky" is sold shall state that it is a "blend of whiskies."

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF AGRICULTURE.

MINE RESCUE WORK—LEASE OF MINE FOR EXPERIMENTATIONS.

The leasing of a mine in Pennsylvania by the United States, on a cash payment of \$1,500, for experimentations in mine rescue work, constitutes a purchase of land within the meaning of section 3736, Revised Statutes, which provides that no land shall be purchased on account of the United States, except under a law authorizing such purchase. The statement in the opinion of September 15, 1910 (*ante*, p. 413), that it would be a wise precaution to have the titles to tracts of land to be acquired for the above-named purpose submitted to the Attorney-General for his opinion as to validity, regardless of whether section 355, Revised Statutes, be applicable or not, contains no intimation that when section 355 does not apply the opinion of the Attorney-General is not necessary.

DEPARTMENT OF JUSTICE,

October 24, 1910.

SIR: I have the honor to acknowledge receipt of your communication of October 19, 1910, in which you state that a mine may be leased in the State of Pennsylvania for a period not to exceed five years on a cash payment of \$1,500, wherein experimentations may be made in mine rescue work, and you ask whether or not such a contract falls within the provisions of section 3736, Revised Statutes, which provides that no land shall be purchased on account of the United States except under law authorizing such purchase.

On September 9, 1910, you submitted to this Department certain proposed contracts offering to the United States, by donation, or without the payment of a substantial consideration, interests in certain lands upon which it was contemplated to erect stations to be used in the demonstration of methods for the rescue of miners, and it was

held, in an opinion dated September 15, 1910, (*ante*, p. 413) that those contracts did not fall within section 3736, Revised Statutes, because they did not involve the expenditure of public moneys. The present question was not then presented in a concrete form, and hence was not answered.

As was said in that opinion, in the passage of the act in question Congress had primarily in mind the expenditure of the public money; and its purpose to prevent such expenditures, unless authorized by some act of Congress, should, I think, be controlling upon the present question, as it was held to be with reference to the questions then considered.

Therefore, without considering the technical question whether at the common law a leasehold estate is "land," it is my opinion that within the meaning of this act the acquiring of the leasehold interest mentioned, for the compensation stated, is a purchase of land.

If it be broadly held that the statute does not apply to the acquiring of an interest in land by lease, then its provisions could, in a large measure, be avoided by the taking of long-term leases instead of acquiring the fee simple title by purchase; and if an attempt were made to distinguish between a temporary and permanent acquisition, which is in fact not authorized by the statute, a new difficulty would be met in endeavoring to determine what length of time should be considered as temporary.

When expenditure of public revenue has been involved, the tendency has been to give full effect to the terms of the act (4 Op. 533; 11 Op. 201; 19 Op. 79), and I concur in the view that its scope should not be restricted by construction.

It is also worthy of note that in the appropriation act of March 3, 1875 (18 Stat. 372), Congress expressly conferred authority upon the Secretary of the Treasury to acquire the right to *use and occupy* sites for life-saving or life-boat stations, homes of refuge, and sites for pier-head beacons, the establishment of which had been or should thereafter be authorized by Congress, which indicates that Congress did not understand that the authorization by Congress of the establishment of such stations would, by

implication, authorize the acquiring of a right of user of sites for their location.

In your communication of September 9, 1910, you inquired whether the proposed contracts fell within section 355, Revised Statutes, which provides that:

"No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building, of any kind whatsoever, until the written opinion of the Attorney-General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given."

It was said in the opinion of September 15 (*ante*, p. 417), that on investigation it had been ascertained that the legislatures of the several States in which the lands described in the contracts were situated had given the consent required by said section 355, and that it was therefore not necessary to determine whether that section applied to said contracts or not; but, it was added:

"I think it advisable, however, that the titles to these tracts of land be submitted to the Attorney-General for his opinion with reference to the validity thereof. This should be done as a wise precaution, regardless of whether said section 355 be applicable to the facts here presented or not."

This contains no intimation, as you suggest it might, that when section 355, Revised Statutes, does apply, the opinion of the Attorney-General as to the validity of the title is not necessary. It was unnecessary to state in the opinion such a requirement, because the language of the statute could not be made more explicit by its repetition; and the suggestion quoted was added, first, that the requirement might be complied with in case section 355 did apply, and, second, because independent of the statute it was deemed a wise precaution that the title to the lands should be examined before improvements should be placed thereon.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE INTERIOR.

466 *Appropriation—Construction of New York Dry Dock.*

APPROPRIATION—CONSTRUCTION OF NEW YORK DRY DOCK.

The Secretary of the Navy has no power after exhausting the present appropriation for the erection of the New York dry dock (36 Stat. 615), to use funds from other appropriations not strictly applicable to that work in order to meet the payments to be made on the contract until a deficiency appropriation shall be made.

The work may continue, however, and the legal obligation rests upon the Government to provide payment therefor.

DEPARTMENT OF JUSTICE,

November 10, 1910.

SIR: I have the honor to acknowledge the receipt of your letter of November 3d instant, inclosing two letters from the Secretary of the Navy "that present the question whether he has any power, after the exhaustion of the present appropriation for the erection of the New York dry dock, to take funds from appropriations not strictly applicable, in order to meet the payments to be made on the contract for the navy-yard, until a deficiency appropriation is made."

It appears that a contract has been entered into for the construction of a dry dock under the provisions in the naval appropriation act of June 7, 1900 (31 Stat. 693):

"Granite and concrete dry dock, to cost not more than one million dollars, for which contract is hereby authorized, two hundred thousand dollars."

Various appropriations have been made for the continuance of this work. In the naval appropriation act approved June 24, 1910 (36 Stat. 615), is the following provision:

"Navy-yard, New York, New York: Dry dock numbered four (limit of cost is hereby increased to two million five hundred thousand dollars), to continue, five hundred thousand dollars."

The amounts of these several appropriations within the limit of the cost stated in the acts can be used until the completion of the work and the payment of all liabilities therefor. The full amount appropriated, including \$550,000 in the last appropriation act, has been, or shortly will be, exhausted.

Section 3678, Revised Statutes, provides:

"All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

It is also provided in the Revised Statutes:

"SEC. 3732. No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year.

"SEC. 3733. No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

These latter sections relate to the making of contracts and purchases. In the case before me the contract was authorized by law. The limit of cost for the work was expressed in the first act and afterwards increased, and appropriation for continuing the work made from year to year. The full amount so appropriated having been exhausted, the inquiry is whether the necessary funds to continue the work during the present fiscal year can be taken from some other appropriation.

Section 3679, Revised Statutes, as amended by section 3 of the deficiency act of February 27, 1906 (34 Stat. 49), provides:

"No executive department or other government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. Nor shall any department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden

emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made in fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made; and all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment, but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and in case said apportionments are waived or modified as herein provided, the same shall be waived or modified in writing by the head of such executive department or other government establishment having control of the expenditure, and the reasons therefor shall be fully set forth in each particular case and communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month."

The legislative prohibition in the sections cited appears to be clear and extensive.

It is suggested that payments could be made from the Treasury under the "General account of advances," created by the act of June 19, 1878 (20 Stat. 167), as follows:

"That the Secretary of the Navy be, and he is hereby, authorized to issue his requisitions for advances to disbursing officers and agents of the Navy under a 'General account of advances,' not to exceed the total appropriation for the Navy, the amount so advanced to be exclusively used to pay current obligations upon proper vouchers

and that 'Pay of the Navy' shall hereafter be used only for its legitimate purpose, as provided by law."

But the advances authorized by this act are limited by section 2, as follows:

"SEC. 2. That the amount so advanced be charged to the proper appropriations, and returned to 'General account of advances' by pay and counter warrant; the said charge, however, to particular appropriations, shall be limited to the amount appropriated to each."

There is here no appropriation to be charged. All appropriations have been exhausted. It is not contemplated that advances could be made which could only be reimbursed from a future appropriation.

There is a distinction between contracts expressly authorized by law, without a sufficient appropriation, and contracts made by appropriations to accomplish certain objects and large enough to fulfill the contracts.

In *Shipman v. United States* (18 Ct. Cls. R. 138, 146) the court said:

"The liability in this case rests wholly upon the appropriation, and is different from those cases which frequently arise wherein Congress passes an act authorizing officers to construct a building or do other specified work without restriction as to cost, and then makes an appropriation inadequate to do the whole of it or make none at all.

"In such cases the authority to cause the work to be done and to make contracts therefor is complete and unrestricted. * * *

"We have frequently held that where there is a liability on the part of the Government, it is not avoided by the omission on the part of Congress to provide the money to discharge it."

The same principle applies where the contract is authorized and a limit of cost fixed, and continuous appropriation estimated for and made.

In the case presented to me the contract for constructing the dry dock was, presumably, expressly authorized by the act of June 7, 1900. The work has progressed until there are no available funds under the special appropriation to pay for the same.

470 *Naval Water Barge No. 7—Disposal of Engine, Etc.*

The officers of the Treasury can not make any payment until an appropriation is made, even if the contract does create a liability greater than the sum appropriated.

The contract is not before me. But, speaking generally, I may say that the work can continue and the legal obligation rests upon the Government to make payment therefor. If monthly payments were contemplated, as is indicated in the Secretary's letter, it is clear that the contractors were fully aware of the condition of the appropriations and their availability. The legislation shows the great desire of the Government to prosecute this work and the intention to provide the means to bring it to a speedy conclusion. It is beyond reasonable doubt that the Congress would, under the extraordinary circumstances stated in the Secretary's letter, speedily provide for the continuing appropriations in an urgent deficiency bill.

Very respectfully,

GEORGE W. WICKERSHAM.

The PRESIDENT.

NAVAL WATER BARGE NO. 7—DISPOSAL OF ENGINE,
BOILER, AND HULL.

The Secretary of the Navy may legally remove the engine and boiler from Naval Barge No. 7, for future use by the Government, since the vessel has been found unfit for further service, and the highest bid received for the vessel was much less than the value of the engine and boiler. The hull, being valueless, may be sunk or destroyed.

DEPARTMENT OF JUSTICE,

November 12, 1910.

SIR: I am in receipt of your letter of November 1, 1910, in which you ask whether you are authorized to remove an engine and boiler from Naval Water Barge No. 7, for future use by the Government, and to destroy the hull. It appears from your letter that this barge has been found unfit for further service, and her name has been stricken from the navy register in conformity with the act of August 5, 1882 (22 Stat. 297). Proposals for the purchase of her were invited pursuant to the act of March 3, 1883 (22 Stat. 599), and while her value is appraised at \$3,000, the

highest offer received for her was \$501. The hull of the vessel is reported to be worthless. Her engine and boiler are, however, valued at much more than the amount of the highest bid, and the naval authorities at Cavite recommend that all bids be rejected, and that the boiler and engine be removed for future use by the Government, and that the hull be sunk.

I find no statute which specifically applies to a case like this; but by virtue of your office and because of your duty to properly care for, protect, and preserve the property of the Government under your control, in the absence of any statute regulating the matter you undoubtedly have the power to dispose of and get rid of such condemned vessels in such way as may seem to you to be most advantageous to the Government. The act of March 3, 1883 (22 Stat. 599), provides for the advertisement and sale of condemned vessels of the navy, and that no such vessel shall be sold for less than the appraised value. In the present case you have endeavored to comply with that statute, but no one is willing to pay the appraised value. You, therefore, very properly propose to utilize such portion of the vessel as is of value, namely, the engine and boiler. I understand from your communication that that being done, the hull will become valueless and should be destroyed in some proper way; that is, by sinking or otherwise. You say:

"It is customary to remove from condemned naval vessels before sale such articles of outfit and equipage as may still be serviceable to the Government."

This custom does not, so far as I can ascertain, depend upon any statute authorizing it, but is based upon the exercise of the general official power which the Secretary of the Navy has in virtue of his office to properly care for and protect the public property committed to his control and to prevent unnecessary waste of government property.

In my opinion, therefore, you can legally dispose of the engine, boiler, and hull of Naval Water Barge No. 7 in the manner you suggest.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE NAVY.

MOUND CITY NATIONAL CEMETERY—ABANDONMENT OF
ROADS LEADING THERETO.

The proviso in the sundry civil act of June 25, 1910 (36 Stat. 723), restricting appropriations for national cemeteries or the repairs of roadways thereto, to the maintenance of a single approach to any national cemetery, was not intended by Congress as general legislation, and does not indicate an intention to abandon two of the three roads approaching the Mound City National Cemetery, near Cairo, Ill.

DEPARTMENT OF JUSTICE,
November 21, 1910.

SIR: I have considered your letter of October 10, 1910, with its accompanying papers, in which you ask my opinion whether Congress has indicated an intention to abandon two of the three roads approaching the Mound City National Cemetery, near Cairo, Ill., by the following proviso of the sundry civil act of June 25, 1910 (36 Stat. 723):

“No part of any appropriation for national cemeteries or the repair of roadways thereto shall be expended in the maintenance of more than a single approach to any national cemetery.”

I am of opinion that this proviso does not indicate such an intention.

Of course, the proviso is not expressly an abandonment of any roads, and the only question is whether it is impliedly so.

As I view the subject it is unnecessary to consider whether a final and irrevocable abandonment of a roadway would be brought about by an act of Congress providing generally that no appropriation should be used in the future for its maintenance, for in this case I think the proviso quoted is intended only to limit the use of appropriations carried by the particular act, thereby suspending repairing for only one year. If this is the true construction of the proviso, then of course it does not imply an abandonment of the road, for only an actual cessation of use, and that for a considerable length of time, is deemed to have such an implication. *Leviston v. Proctor* (27 Ill. 414, 418); *Washburn on Easements and Servitudes* (4th Ed.) 199. In the *Leviston* case the court stated the rule as follows:

"A transient or partial nonuser will not suffice. * * * It is insisted that as this road, at the point of obstruction, had not been repaired by the corporate authorities, it was not regarded by them as a public highway. But all of the evidence to that point shows that, from the nature of the ground, it was never required. This being true, the law will not require a useless act. Had it been necessary, and it had never been repaired, that fact, with others, would have been proper for the consideration of the jury, in determining whether it was regarded, by those having charge of the highways, as a public road. Of itself, that fact is not sufficient to vacate a legally acquired public highway."

There are several reasons why I am of opinion that the proviso is properly to be construed as applicable only to the appropriations carried by the act in which it appears, notwithstanding the fact that the language of the clause, not being in terms explicitly limited, is, standing alone, open to the other construction.

The policy of Congress in these appropriation bills appears to have been long settled against the inclusion of any general legislation. For example, the proviso contained in the paragraph next preceding the clause under construction prohibits any railroad from encroaching upon any of these cemetery roads, and though, in terms, it is just as general in its language as the clause under construction, it has been specifically reenacted by Congress year after year in every sundry civil act from 1895 to the present time. This annual reenactment of such clauses is the common practice in these acts, and in my opinion it indicates plainly a general policy of Congress to limit their scope to the year covered by the act.

The policy is also indicated by the rules of both of the Houses. The Senate rule (XVI, par. 3) is as follows:

"No amendment which proposes general legislation shall be received to any general appropriation bill."

The House rule (XXI, par. 2) is as follows:

"No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law,

unless in continuation of appropriations for such public works and objects as are already in progress; nor shall any provision changing existing law be in order in any general appropriation bill or in any amendment thereto."

Also the title of the act, "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1911, and for other purposes," tends to repel the idea that general legislation was intended.

Again, the context of the particular clause points to the same conclusion. This context, including the clause itself, is as follows:

"Repairing roadways to national cemeteries: For repairs to roadways to national cemeteries which have been constructed by special authority of Congress, twelve thousand dollars: *Provided*, That no railroad shall be permitted upon the right of way which may have been acquired by the United States to a national cemetery, or to encroach upon any roads or walks constructed thereon and maintained by the United States: *Provided further*, That no part of this sum shall be used for repairing any roadway not owned by the United States within the corporate limits of any city, town, or village.

"No part of any appropriation for national cemeteries or the repair of roadways thereto shall be expended in the maintenance of more than a single approach to any national cemetery.

"For the completion of a protective fence along the roadway leading from Mounds to the national cemetery near Mound City, Pulaski County, Illinois, and for the drainage of the ponds or borrow pits caused by the construction of said roadway, three thousand dollars, to be expended under the Quartermaster-General." (36 Stat. 723.)

It appears, therefore, that the paragraph immediately preceding and the paragraph immediately following are both necessarily limited to the particular appropriation carried by the statute, and it would require a more explicit statement than the clause itself contains to differentiate it from these surrounding provisions.

The congressional history of the legislation also leads me to the same conclusion. On March 14, 1908, and again

on December 14, 1909, your department called the attention of Congress to the fact that there were three different approaches to this cemetery: First, the Mound City road; second, the Cache River road; and third, the Mounds Junction road; and that the latter two of these roads had been constant sources of annoyance, owing chiefly to the excessive proportion which they absorbed out of the total annual appropriations for maintaining all the cemetery roadways in the United States. In this connection your department requested that an item be inserted in the forthcoming sundry civil bill providing for the transfer of these two roads and restricting your department from maintaining more than one approach to any national cemetery. Thereupon a clause was inserted in the appropriation bill, as it first came before the House Committee of the Whole, covering expressly both the recommendation for transfer of the roads, and the recommendation for restriction of the repairs. This paragraph was as follows:

“For the completion of a protective fence along the roadway leading from Mounds to the national cemetery near Mound City, Pulaski County, Ill., and for the drainage of the ponds or borrow pits caused by the construction of said roadway, \$3,000, to be expended under the Quartermaster-General: *Provided*, That immediately after said work shall have been completed or said appropriation expended the Secretary of War is authorized and directed to convey to the commissioners of Pulaski County, Ill., whatever right or title the United States may have to roadways and the land on which they have been constructed from said national cemetery to Mounds, formerly known as Mounds Junction, and from said cemetery to the Cache River; and if said commissioners fail or refuse to accept such conveyance the United States from that time abandons said roads and they shall no longer be maintained by the United States: *And provided further*, That hereafter no part of any appropriation for national cemeteries or the repair of roadways thereto shall be expended in the maintenance of more than a single approach to any national cemetery.” (Cong. Rec., vol. 45, pt. 7, p. 6933.)

A point of order was made against this paragraph on the ground that it was general legislation in an appropriation bill and, therefore, in violation of the policy of the House as declared by the aforesaid rules, and this point of order was sustained and the paragraph went out of the bill.

Later, the existing proviso restricting the use of appropriations was restored, and the same point of order was made against it, but the point was overruled, the Chairman saying:

"It is a clear limitation on the appropriation in this bill and is in order."

Under all these circumstances I do not think this clause should be construed as having the effect of the whole paragraph as originally introduced and then eliminated.

In the context of the clause as quoted above, it will be noted that explicit provision is made for the completion of a protective fence along the Mound City road. The existence of this provision seems to me of some weight in corroboration of this view of the intention of Congress, for if the clause is to be construed as an abandonment of two out of the three roads to this cemetery, and if your department had been intended to have full power to select which of the two roads should be abandoned, Congress would hardly have prescribed the building of this fence, because it might be that your department would decide that that very road should be itself abandoned.

All these considerations seem to me to outweigh the circumstance that at one stage in the progress of the bill the clause read—

"No part of any appropriation *herein* for national cemeteries or the repair of roadways thereto shall be expended in the maintenance of more than a single approach to any national cemetery."

It was in this form that the original amendment offered in the House on May 26, 1910, was passed by the House. The Senate struck it out, but in conference the House committee insisted upon it and the conference report of June 23, 1910, states that "the House provision is re-

stored." How the word "herein" happened to be dropped out in the final form of the bill does not appear, but in my opinion its absence is not controlling as against numerous other considerations above stated.

I am of opinion, therefore, that the proviso was not intended to be general legislation, and, therefore, that it should not be construed as indicating an intention to abandon any of the roads in question.

I feel the more assured in this conclusion because of the general principle that the jurisdiction and property rights of the United States should not be lessened except upon the clearest expression by Congress. (*U. S. v. Herron*, 20 Wall. 251, 263.)

I return all papers herewith.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

CONSTRUCTION OF BATTLE SHIP NO. 34—INSUFFICIENT
APPROPRIATION.

It would be improper for the Secretary of the Navy to proceed with the construction of battle ship No. 34 at the Government navy yard, New York, authorized by the act of June 24, 1910 (36 Stat. 605, 628), it having been ascertained that the vessel can not be completed within the limit of cost fixed by that act.

DEPARTMENT OF JUSTICE,

November 30, 1910.

SIR: The naval appropriation act approved June 24, 1910 (36 Stat. 605, 628), under the heading "Increase of the Navy," provides:

"That, for the purpose of further increasing the naval establishment of the United States, the President is hereby authorized to have constructed two first-class battle ships to cost, exclusive of armor and armament, not exceeding six million dollars each, similar to the battle ship authorized by the act making appropriations for the naval service

for the fiscal year ending June thirtieth, nineteen hundred and nine.

* * * *

"And the contract for the construction of said vessels shall contain a provision requiring said vessels to be built in accordance with the provisions of an act entitled 'An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia,' approved August first, eighteen hundred and ninety-two, and shall be awarded by the Secretary of the Navy to the lowest best responsible bidder, having in view the best results and most expeditious delivery; and in the construction of all of said vessels the provisions of the act of August third, eighteen hundred and eighty-six, entitled 'An act to increase the naval establishment,' as to materials for said vessels, their engines, boilers, and machinery, the contracts under which they are built, the notice of any proposals for the same; the plans, drawings, and specifications therefor, and the method of executing said contracts shall be observed and followed, and subject to the provisions of this act, except that the Secretary of the Navy may accept, in lieu of an indemnity bond, the deposit by contractors of United States government or state bonds, under such conditions and in such manner as the Secretary may prescribe, having due regard for the rights and protection of the United States, all said vessels shall be built in compliance with the terms of said act, and in all their parts shall be of domestic manufacture; and the steel material shall be of domestic manufacture and of the quality and characteristics best adapted to the various purposes for which it may be used, in accordance with specifications approved by the Secretary of the Navy, provided contracts for furnishing the same in a reasonable time, at a reasonable price, and of the required quality can be made with responsible parties: *Provided*, That not more than one of the battle ships provided for in this act shall be built by the same contracting party: *Provided always*, That one of the battle ships herein authorized shall be constructed in one of the navy-yards."

Referring to these provisions, in your letter of November 16, 1910, you say:

"The Department has directed that one of the battle ships authorized by this act, to be designated as battle ship No. 34, be constructed at the navy-yard, New York. Preliminary estimates show, however, that the cost of building her there will considerably exceed the limit of cost fixed by Congress, and I have the honor to request your opinion as to whether under such conditions this Department has authority to proceed with the construction of the vessel."

It will be observed that the act provides that the two first-class battle ships mentioned shall be "similar to the battle ship authorized by the act making appropriations for the naval service for the fiscal year ending June 30, 1909." The latter act, which was approved May 13, 1908 (35 Stat. 158), authorized the construction of "two first-class battle ships to cost, exclusive of armor and armament, not exceeding six million dollars each, similar in all essential characteristics to the battle ship authorized by the act making appropriations for the naval service for the fiscal year ending June 30, 1908."

It also provided that "at least one of such battle ships shall be built and constructed under the direction of the Secretary of the Navy at one of the navy-yards."

It appears that under authority of the act of May 13, 1908, the battle ships *Florida* and *Utah* were being constructed at the time of the passage of the act in question, the *Utah* at a private shipyard and the *Florida* at the government navy-yard at New York.

The provision in the act of June 24, 1910, that one of the battle ships therein authorized should be constructed in one of the navy-yards was not in the bill as introduced in the House, but, after a futile attempt to insert such an amendment in the House (45 Cong. Rec. 4432-4433, 4442-4443), was inserted as an amendment when the bill was before the Senate (*ib.* 6590).

The debates in the House and the Senate upon this amendment show that it was objected to on the ground of

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the greater cost of constructing such vessels at the government navy-yards than in private shipyards (45 Cong. Rec. 6736-6738, 6925, 7820, 7828, 7834, 7836). Mr. Foss, chairman of the House Committee on Naval Affairs, who was in charge of the bill, stated on one occasion that it would cost \$2,000,000 more in the case of each vessel to build them under the eight-hour law and in the government navy-yards (*ib.* p. 7820), and later that it would increase the cost of such a ship \$1,500,000 to build it there (*ib.* 7838). Mr. Foss also referred to the fact that the battle ship *Utah* was being built by a private shipbuilding company under a contract price of \$3,946,000, while her sister ship *Florida*, which was being constructed at the government navy-yard at New York, would cost \$6,300,000. (*Ib.* 7820.)

Mr. Foss based his statements upon certain letters to him from Chief Constructor Capps of the navy, set forth in the Congressional Record (*ib.* 7839), in one of which, under date of May 26, 1910, that officer stated:

"3. The latest modified estimate for the construction of the *Florida* was \$6,311,061. This was on the basis of the indirect charges in vogue from July 1, 1909, to a very recent date. Within a few days the department has issued supplementary instructions as to indirect charges, which should somewhat decrease the amount of such charges. It is impracticable to give definite estimate of such decrease, as the system has only been in effect for a few days.

"4. The contract price for the *Utah*, with the New York Shipbuilding Company, was \$3,946,000. This figure is directly comparable with the figures given above as the estimated cost of the *Florida*, as it covers the same work."

In a letter to Mr. Foss, dated May 28, 1910, which also appears in the Congressional Record (*ib.* 7838), the Acting Secretary of the Navy said:

"While it is impossible to give an entirely satisfactory estimate of the relative cost of contract-built and navy-yard-built battle ships at the present time, the department is of the opinion, for the reasons already stated, that battle ships built at navy-yards will cost, when completed, from

20 to 30 per cent more than similar battle ships built in private shipyards, assuming, of course, that the present low contract prices for such work will continue to hold good."

A tabulated statement of the cost of battle ships and cruisers furnished Mr. Foss by Chief Constructor Capps and set forth in the Congressional Record (*ib.* 7839) is in part as follows:

BATTLE SHIPS.

Ship.	Author- ized.	Normal displace- ment.	Contract price.	Cost per ton of normal displace- ment.
* *	* *	* *	* *	* *
		<i>Tons.</i>		
Delaware.....	1906	20,000	\$3,987,000	\$199.35
North Dakota.....	1907	20,000	4,377,000	218.85
Florida.....	1908	21,825	a 6,000,000	274.91
Utah.....	1908	21,825	3,946,000	180.80
Wyoming.....	1909	26,000	4,450,000	171.15
Arkansas.....	1909	26,000	4,675,000	179.81

a Limit of cost.

It thus appears that at the time the House receded, as it did (45 Cong. Rec. 7840), from its disagreement to the Senate amendment providing for the construction of one of the battle ships at a government navy-yard, it was advised of the view of the chairman of the Committee on Naval Affairs and of the Navy Department that it would cost considerably more to construct a battle ship there than in a private shipyard. It was also advised that the battle ship *Florida*, which was then being constructed at New York, and which was to be the prototype of the battle ships authorized by the bill under discussion, would cost about \$300,000 in excess of the \$6,000,000 authorized by the act of May 13, 1908.

In my judgment, however, these facts are not sufficient to authorize you to proceed with the construction of battle ship No. 34 at the New York Navy-Yard in disregard of the limitation as to cost imposed by the act. The only inference that can properly be drawn from the action of

the House in accepting the Senate amendment without raising the limitation as to cost, notwithstanding the protest that was made, would seem to be that the Congress as a body thought that the vessel could be constructed at a government navy-yard within the limit of cost fixed by the act; and it is to be observed that some of the Members dissented from the views expressed by Mr. Foss as to the great increase in cost caused by the construction of such vessels at government navy-yards.

It is further to be observed that the act does not require the battle ships authorized to be built identically like the *Florida* and *Utah*, but only similar to those vessels. This would seem to afford some latitude in their construction, and might enable you to keep within the limit of cost fixed by the act. If, however, to observe the limitation as to cost would require any serious departure from the standard of the *Florida* and *Utah*, that course should not be pursued.

The conclusions stated are in line with such authorities as I have been able to find that are directly in point.

In 9 Comp. Dec. 638, the Comptroller of the Treasury held that where it had been ascertained that the cost of a certain improvement in the Passaic River, New Jersey, would exceed the limit fixed by Congress in appropriating therefor, there was no authority to enter into a contract for the partial completion of the work, or to expend the money in doing a portion of the work. In the course of that opinion the Comptroller refers to another opinion rendered by him, in which it was held, reviewing a prior decision, that a partial appropriation for certain river and harbor improvements could be used notwithstanding the work could not be completed within the limit of cost fixed by the act, this conclusion being reached by considering facts developed in Congress affecting the particular case not before the Comptroller when his first decision was rendered. In that case, however, it appeared that there were two acts, the first authorizing the work and limiting the cost, and the second, passed a year later, authorizing the continuance of the work. The circumstance referred to by the Comptroller was the statement of the chairman of the House Committee on Appropriations that the purpose

of the second act was to enable the Secretary of War to go on with the work without reference to the limitation as to cost made in the prior act.

Here we have one and the same act imposing the condition as to place of construction and fixing the limitation as to cost.

In 8 Comp. Dec. 326, it was held that the provision in an act of Congress directing the Secretary of the Treasury to cause to be erected a substantial, commodious, and fire-proof building for the purpose of a custom-house, at a cost not exceeding \$3,000,000, required the erection of a building of the character described, complete in all particulars that were necessary and appropriate to the purpose for which it was intended, within the limit of cost specified, and that the expenditure of the whole amount provided for in the erection of an incomplete building was not authorized.

So, in 20 Op. 653, Attorney-General Olney held that, under the terms of a joint resolution of Congress authorizing the construction of a wharf of a certain character, the Secretary of State was not authorized to accomplish the purpose of Congress by constructing a wharf of a different character, although the construction of the sort of wharf authorized with the appropriation made had become impracticable. The only appropriate remedy for this state of things, said Mr. Olney, was additional legislation by Congress.

It follows, therefore, that if you are of opinion that a battle ship of the character contemplated by Congress can not be built at a government navy-yard within the limitation as to cost fixed by the act, it would be improper to proceed further in the matter without additional legislation by Congress.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE NAVY.

LEASE OF LANDS ON WHICH TO ERECT BOUNDARY LINE
MONUMENTS—CANADIAN BOUNDARY.

In leasing lands for the purpose of locating permanent monuments thereon to define the boundary line between the United States and Canada, under Article IV of the treaty between the United States and Great Britain, proclaimed July 1, 1908, the lessee should be described as "The United States of America."

The Government has the right to lease lands in a State without the consent of the State, and since the leases contemplated constitute substantially fee simple estates, being for nine hundred and ninety-nine years and the consideration therefor merely nominal, they do not come within the operation of Article I, section 14, of the constitution of New York of 1894, which prohibits the leasing of agricultural lands for a greater period than twelve years.

DEPARTMENT OF JUSTICE,
November 30, 1910.

SIR: I have the honor to acknowledge the receipt of a letter from your department, dated the 23d instant, together with its inclosures, relating to certain questions connected with leasing lands upon which to locate permanent monuments defining the boundary line between the United States and Canada, to be ascertained under Article IV of the treaty between the United States and Great Britain, proclaimed July 1, 1908, relating to the Canadian international boundary line.

My opinion is asked as to the form of lease submitted, whether said lease should run either directly to the Government of the United States or to the Secretary of State; the right of the Government to lease land without the consent of the State; and if lands in the State of New York (and perhaps in other States) can be leased for a longer term than twelve years.

The form of lease submitted with said letter is sufficient for all of the purposes contemplated except as I have noted thereon with pencil.

The lessee should be described as "The United States of America," as it is the universal practice of this department, except where Congress has otherwise provided, not to accept deeds, leases, or other instruments of similar character wherein the name of an official of the United States is used as lessee, for all property acquired or interest therein should vest, not in any person on behalf of the Government, but in the United States itself.

There is nothing in the Constitution which prohibits the United States purchasing land within a State without the consent of the state legislature, for "undoubtedly, the United States may purchase lands within the States and build and use public structures upon them without the consent of the legislature of the State," as "the United States, being a *legal person*, is capable as any other person is to purchase and hold lands" (10 Op. 35, 38), and "payment of the purchase money for the land may be made, though the legislature of the State has not consented to the purchase." (15 Op. 212.)

Under article 1, section 14, of the constitution of New York, 1894, page 128 (New York Annotated Constitution)—

"No lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid."

The leases proposed to be entered into are for "the term of nine hundred and ninety-nine years computed from the date hereof." They are "to all imaginable purposes, a fee simple estate" (*Montague et al. v. Smith*, 13 Mass. 403); and as a nominal consideration is to be paid for each lease taken, the same would not come within the operation of said constitution, for by that instrument "there must be a reservation of rent or service. A reservation is defined to be a keeping aside, or providing, as where a man lets or parts with his land but reserves or provides himself a rent out of it for his own livelihood." (*Stephens v. Reynolds*, 6 N. Y. 458.) "The evil aimed at by the constitution is long leases of farming lands for farming purposes," and "it is not provided that no lease shall be valid for a longer term than twelve years; but provision is that the kind of lease described shall be invalid; which is, as we think, a lease of agricultural lands for agricultural purposes." (*Mass. Nat. Bank v. Shinn*, 163 N. Y. 366.)

In my opinion the corrected form of lease herewith returned to you will be satisfactory when properly executed, and the grantee to be named therein is "The United States of America;" that the Government has the right

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to lease lands in a State without the consent of the State; and under the present circumstances for a period longer than twelve years.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF STATE.

COMMANDANT OF MARINE CORPS—RETIREMENT—TEMPORARY FILLING OF VACANCY.

After a commandant of the U. S. Marine Corps is placed upon the retired list of officers of that corps, on account of age, he can not legally be retained in his former office of commandant of the Marine Corps until his successor is appointed.

An officer on the active list of the Marine Corps can not be temporarily detailed to fill a vacancy thus created, with authority to transact official business and sign orders and correspondence as "Acting Commandant, U. S. Marine Corps."

During a vacancy caused by the retirement of a commandant of the United States Marine Corps, the orders and correspondence connected with the office should be signed by the Secretary of the Navy, or by the Acting Secretary, in person.

DEPARTMENT OF JUSTICE,

November 30, 1910.

SIR: I have the honor to respond to the request in your communication of the 15th instant for an opinion upon the following questions, to wit:

"1. Whether, when Maj. Gen. George F. Elliott, commandant, U. S. Marine Corps, is placed upon the retired list of officers of the Marine Corps. November 30, 1910, on account of age, that officer could legally be retained in his present office of commandant of the Marine Corps until his successor is appointed.

"2. Whether an officer on the active list of the Marine Corps could be temporarily detailed to fill the vacancy caused by General Elliott's retirement, with authority to transact official business and sign orders and correspondence as 'Acting Commandant, U. S. Marine Corps.'

"3. If the foregoing questions be answered in the negative, whether an officer on the active or retired list of the Marine Corps could be detailed, temporarily, to transact

the business connected with the office of the commandant, but to sign orders and correspondence 'By direction of the Secretary of the Navy.'"

Aside from the question whether the Marine Corps can be regarded as a bureau, sections 178, 179, and 180 of the Revised Statutes, which provide for the filling of a temporary vacancy in the office of the chief of any bureau, or of any officer thereof, "in case of the death, resignation, absence, or sickness of the incumbent," have here no application, as the vacancy in the office of commandant of the United States Marine Corps will not result from either of the causes mentioned. (27 Op. 337, 345.)

But my attention is called to that provision of the act of June 7, 1900, ch. 859 (31 Stat. 703), which reads:

"During a period of twelve years from the passage of this Act any naval officer on the retired list may, in the discretion of the Secretary of the Navy, be ordered to such duty as he may be able to perform at sea or on shore, and while so employed shall receive the pay and allowances of an officer of the active list of the grade from which he was retired," and it is suggested that under this statute Major-General Elliott might be assigned temporarily to the position created by his retirement.

Without reference to whether General Elliott will, after retirement, be a "naval officer on the retired list," within the meaning of this act, or whether a retired officer may, under its provisions, be assigned to duty in the Marine Corps, I do not think this statute has the effect suggested. By section 18 of the act of March 3, 1899, ch. 413 (30 Stat. 1008), entitled "An act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States," it is provided that the active list of the line officers of the United States Marine Corps shall consist of one brigadier-general, five colonels, and the other officers designated, and that "vacancies in the grade of brigadier-general shall be filled by selection from officers *on the active list* of the Marine Corps not below the grade of field officer."

By act of July 1, 1902, ch. 1368 (32 Stat. 686), it was provided:

"That from and after the date of the approval of this act, the commandant of the Marine Corps shall have the rank, pay, and allowances of a major-general in the Army, and when a vacancy shall occur in the office of commandant of the corps, on the expiration of the service of the present incumbent, by retirement or otherwise, the commandant of the Marine Corps shall thereafter have the rank, pay, and allowances of a brigadier-general."

And by act of May 13, 1908, ch. 166 (35 Stat. 155) it was provided:

"That from and after the passage of this act, and in order to further increase the efficiency of the United States Marine Corps, the following additional officers, non-commissioned officers, drummers, trumpeters, and privates to those now provided by law for said corps are hereby authorized and directed, namely: One major-general commandant, in lieu of the present brigadier-general commandant. * * *

"That the vacancies now existing in the line and staff departments of the United States Marine Corps and those created by this act *shall be filled in the manner provided by law.*"

It thus appears that Congress has repeatedly passed legislation dealing particularly with the personnel of the officers of the Marine Corps, and especially with the commandant, designating from what class of officers vacancies shall be filled and expressly requiring that the commandant shall be selected from the *active* list of officers. In speaking of filling a vacancy no qualifying word is used to indicate that reference is had to only permanent appointments, and the statutes were apparently intended to apply to all appointments to perform the duties of the office, whether permanent or for a limited period of time.

It is a well-recognized principle of construction that an act which relates specially to a particular subject is not modified or repealed by a subsequent general statute, though such general statute might, in the absence of the special one, apply to the matter to which it relates, unless

the intention of the legislative body to the contrary is made clearly manifest. (Endlich Inter. Stat., sec. 223; 36 Cyc. 1087.)

But, not only is there nothing in this very general provision of the act of 1900 to indicate that Congress intended for it to apply to a vacancy in the office of commandant of the Marine Corps, but some of the special statutes relating to this office, which show that no change in making appointments thereto was contemplated, have been enacted since the passage of the said act.

If full effect were given to the broad provisions of that act, the result would be most far-reaching and extraordinary. In the present case, General Elliott, though on the retired list, might be assigned for an indefinite period to perform the duties of commandant of the Marine Corps, when he could not be so assigned without appointment to the position, if he were on the *active* list, though the statutes clearly contemplate that its duties shall not be performed by an officer not on the active list.

Sections 177, 178, 179, and 180, Revised Statutes, provide that the positions of chiefs of bureaus shall not be filled by officers below certain grades; yet, under the construction contended for, when an officer below the specified grades is retired, he, though ineligible before, might at once be assigned by the Secretary of the Navy to the head of a bureau; and as there is no limitation as to the length of time a vacancy may exist, the assignment might become practically permanent.

It can not be believed that Congress intended any such effect to be given to this general act, and I understand that your department has never so interpreted it, but has treated it as applying only to duties with reference to which there exists no special legislation.

I am, therefore, constrained to answer the first two questions in the negative.

With reference to the manner and by whom the duties of the office shall be administered during the vacancy, I will say that section 1621, Revised Statutes, provides:

“The Marine Corps shall, at all times, be subject to the laws and regulations established for the government of the

Navy, except when detached for service with the army by order of the President; and when so detached they shall be subject to the rules and articles of war prescribed for the government of the Army."

In *United States v. Dunn* (120 U. S. 249, 253), in considering the status of the Marine Corps, the Supreme Court summed up their conclusion as follows:

"We are of opinion that, taking all these statutes and the practice of the Government together, they are a military body, primarily belonging to the Navy, and under the control of the head of the naval department, with liability to be ordered to service in connection with the Army, and in that case under the command of army officers."

And in an opinion prepared by Solicitor-General Bowers, and transmitted to your department on October 6, 1909 (28 Op., 19), it was said:

"The statute leaves no room for doubt. The Marine Corps is stated to be 'at all times' subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President. Nothing but such order by the President, or by his authority, can alter the ordinary connection of the Marine Corps with the Navy and connect that corps with the Army.

Clearly, therefore, in the absence of a special order from the President, detaching the Marine Corps for service with the Army, the office of commandant is under the direct supervision and control of the Secretary of the Navy, and its duties may be performed by him or by the Acting Secretary. (*Swaim v. United States* (165 U. S. 553).)

But these duties must be performed under his supervision, and not *independently* by some one detailed by him for that purpose; and I think, therefore, the orders and correspondence should be signed by the Secretary of the Navy or the Acting Secretary in person.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

AMERICAN RAILROAD COMPANY OF PORTO RICO—ASSIGNMENT TO—EXEMPTION FROM TAXATION.

The Legislative Assembly of Porto Rico did not exceed its powers in granting to the "Compañía de los Ferrocarriles de Puerto Rico," in an act passed February 4, 1902, an exemption from taxation upon its railroad lines and property theretofore built and acquired by it, as well as the railroad lines and property thereafter to be built and acquired by it.

The exemption applies only to those lines and property which were the possession of that company, and was not assignable. Consequently it does not apply to railroad lines or property built or acquired by subsequent purchasers, lessees, or operators.

The exemption does not extend to the "American Railroad Company of Porto Rico, Central Aguirre, operator," to which company the Compañía de los Ferrocarriles leased all its property, notwithstanding the fact that the executive council on July 22, 1902, by an ordinance, authorized the latter company to assign to the American Railroad Company the right to construct, maintain, and operate the railroad line from Ponce to Guayama, the building of which had been authorized by ordinance of the executive council on October 28, 1901, and notwithstanding the ordinance of assignment was afterward approved by the President.

Immunity from taxation must be construed most strongly against the grantee and will not be held assignable in order to pass to a purchaser on a sale, under mortgage, or otherwise, without express authorization.

DEPARTMENT OF JUSTICE,

December 1, 1910.

SIR: I have carefully examined an opinion rendered by the Attorney General of Porto Rico (Mr. Brown) to the Treasurer of that Territory, respecting the legality of an assessment for taxation purposes of the "American Railroad Company of Porto Rico, Central Aguirre, operator," which you have transmitted to me with the request that I express my views with respect to the conclusions reached. These conclusions may be summarized in two propositions:

First. That the Legislative Assembly of Porto Rico exceeded its powers in granting to the "Compañía de los Ferrocarriles de Puerto Rico," afterwards assigned to "American Railroad Company of Porto Rico, Central Aguirre, operator," an exemption from taxation upon its railroad lines and property "heretofore built and acquired by it as well as the railroad lines and property hereafter to be built and acquired by it."

Second. That even if the Legislative Assembly of Porto Rico had power to grant said exemption, the exemption applies only to those lines and property which were in the possession of the company named in the act of the legislative assembly; that such exemption was not assignable, and therefore does not apply to railroad lines or property built or acquired by subsequent purchasers, lessees, or operators.

I have given very careful consideration to the exceedingly able argument by which the Attorney General of Porto Rico supports these propositions, but I am unable to concur with his conclusion upon the first proposition, although I agree with that embodied in the second.

First. With respect to the first proposition:

It appears from the papers submitted that on October 28, 1901, the Executive Council of Porto Rico granted a franchise to the *Compañia de los Ferrocarriles de Puerto Rico*, its successors and assigns, authorizing it to extend its railway lines to and between certain points in the island of Porto Rico, with a qualified right to sell and transfer the same. On July 22, 1902, the executive council by ordinance duly consented to the assignment to Henry de Ford, his heirs, etc., and to a proposed corporation to be designated as "*American Railroad of Porto Rico, Central Aguirre, operator*," of the right to construct, maintain, and operate the railroad line from Ponce to Guayama authorized by the above-mentioned ordinance of October 28, 1901. By act of the Legislative Assembly passed February 4, 1902, it was enacted that—

"The *Compañia de los Ferrocarriles de Puerto Rico*, its successors and assigns, are hereby exempted from all insular, municipal, or local taxation of every name and nature for a period of twenty-five (25) years from the date of the acceptance by it of a certain ordinance passed by the Executive Council of Porto Rico on the twenty-sixth day of October, nineteen hundred and one, granting to it the right to extend its railroad lines to and between certain points in the island of Porto Rico * * * ."

The Attorney-General of Porto Rico is of the opinion that the legislative assembly was without authority to

grant this exemption, because of the provisions of the act of Congress passed July 30, 1886, chapter 818 (24 Stat. 170). This act is entitled, "An act to prohibit the passage of local or special laws in the Territories of the United States, to limit territorial indebtedness, and for other purposes."

Section 1 enacts:

"That the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say: * * *"

Then follows the enumeration of a number of such cases, including the following:

"Granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose.

"Granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever.

"In all other cases where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the Territorial legislatures thereof."

This statute, the Attorney-General of Porto Rico argues, is made applicable to Porto Rico by force of the provisions of section 14 of its organic act, known as the "Foraker Act," approved April 12, 1900 (31 Stat. 77), viz:

"That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico."

One of such statutory laws of the United States, in his opinion, is the act of July 30, 1886, restricting the powers of the legislatures of the Territories of the United States; which act he maintains was not locally inapplicable to Porto Rico, but embodied a sound governmental policy, and which therefore qualified and restricted the powers

granted to the legislative bodies of Porto Rico by the "Foraker Act."

Passing the question whether or not a statute restricting the powers of the legislatures of "the Territories of the United States now or hereafter to be organized" is embraced within the general description "of the statutory laws of the United States not locally inapplicable," which are to "have the same force and effect *in Porto Rico* as in the United States"—a proposition which, in my opinion, is exceedingly doubtful—the provisions of the "Foraker Act" are in themselves, it appears to me, clearly inconsistent with any such limitation.

The "Foraker Act" contains in itself a complete scheme for the civil government of the Territory of Porto Rico. By section 8 it enacts:

"That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, *until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States* * * *"

Other sections of the act pertinent to the present inquiry are the following:

"SEC. 27. That all local legislative powers hereby granted shall be vested in a legislative assembly which shall consist of two houses; one the executive council, as hereinbefore constituted, and the other a house of delegates, to consist of thirty-five members elected biennially by the qualified voters as hereinafter provided; and the two houses thus constituted shall be designated 'The legislative assembly of Porto Rico.'

"SEC. 32. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances there-

for; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: *Provided, however,* That all grants of franchises, rights, and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same.

"SEC. 15. That the legislative authority hereinafter provided shall have power by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this act, as it may from time to time see fit."

The grant of legislative power contained in these sections is, it appears to me, entirely inconsistent with the theory that the restrictions contained in the act of 1886 were imposed upon the legislature of Porto Rico. The provisions, for example, contained in section 32, empowering the legislative assembly power "to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor," is quite inconsistent with the provisions in the act of 1886 prohibiting territorial legislatures from passing local or special laws "incorporating cities, towns, or villages, or changing the charter of any town, city, or village;" and the power to grant "franchises, rights, and privileges or concessions of a public or quasi-public nature" vested in the executive council with the approval of the governor, by section 32, is inconsistent with the restriction in section 1 of the act of July 30, 1886, prohibiting the passage of local or special laws granting to any corporation, association, or individual, the right to lay down railroad tracks or amending existing charters for such purpose.

It is obvious that Congress adopted with respect to Porto Rico a different means of protecting the public from the improvident grant of franchises from that of restricting its exercise of power by the limitations of the act of 1886, by requiring all franchise rights, privileges, or concessions

of a public or quasi-public nature to be made by the executive council, a body composed entirely of Presidential appointees, with the approval of the governor, and requiring all such grants to be reported to Congress, which reserved the power to annul or modify the same. For the purpose of making this control more efficacious, a joint resolution of Congress adopted May 1, 1900, and approved by the President (31 Stat. 715), provided:

“That all railroad, street railway, telegraph and telephone franchises, privileges or concessions granted under section thirty-two of the ‘Foraker Act,’ shall be approved by the President of the United States, and no such franchise, privilege, or concession shall be operative until it shall have been so approved.”

Section 3 of the said joint resolution further regulated the grant of such franchises by requiring them to contain certain provisions with respect to the issue of stock or bonds, and otherwise regulated the exercise of such franchises. Thus, we find in the “Foraker Act” and in this joint resolution a complete legislative scheme with respect to the granting of franchises for Porto Rico, which renders entirely unnecessary the restrictions of the act of 1886, as it accomplishes the same purpose by a different method.

In this view of the statutes cited, it is not necessary to consider whether or not Porto Rico is “one of the territories of the United States” within the meaning of the act of July 30, 1886. I may, however, observe that the case of *New York ex rel. Kopel v. Bingham* (211 U. S. 468), cited by Mr. Brown, does not seem to me to sustain the proposition he contends for. In that case a warrant was issued by the governor of Porto Rico and honored by the governor of New York for the arrest of one Kopel, who had committed an offence against the laws of Porto Rico. On *habeas corpus* in the United States courts in New York, it was contended by Kopel that Porto Rico, not being a territory within the meaning of section 5278, Revised Statutes, the governor of the island had no lawful right to issue his requisition, and the governor of New York no right to issue his warrant under which Kopel was detained. The contention was repudiated by all the courts. It was not

adjudged that Porto Rico was a territory of the United States within the meaning of the act of 1886. The authority of the governor of Porto Rico to demand requisition is carefully put by all of them upon the provisions of sections 14 and 17 of the "Foraker Act."

Section 14 provides:

"That the statutory laws of the United States not locally inapplicable * * * shall have the same force and effect in Porto Rico as in the United States."

Section 17 provides that the governor—

"shall at all times faithfully execute the laws, and he shall in that behalf have all the powers of governors of the Territories of the United States that are not locally inapplicable."

Section 5278, Revised Statutes, authorizes the executive authority of any State or Territory to demand the arrest and delivery up of a fugitive from justice. The Supreme Court, by Chief Justice Fuller, said:

"We quite agree with Judge Hough that 'to allege that the only existing law under which a Porto Rican fugitive from justice can be returned thereto from the United States is 'locally inapplicable' would be to make a jest of justice.'"

It was this authority given by the statute law of the United States to governors of "Territories of the United States" which was expressly conferred upon the governor of Porto Rico by section 17 and not left to inference based upon the conclusion that Porto Rico was one of the "Territories of the United States." As a matter of practical interpretation of the organic act and joint resolution pertaining to Porto Rico above referred to, I am advised that while franchises, including the very franchise under consideration, have been granted conformably to the provisions of the organic act by the executive council, and have been approved by the Governor of Porto Rico and by the President, after examination by Attorneys-General of the United States, and have been submitted to Congress; no such franchise has been annulled by Congress, and no intimation from any source has been given that they were in contravention of the act of 1886. Moreover, as the

Attorney-General states, the action of the insular government has been in conformity with the views here expressed.

Second. While the question is not free from doubt, yet I concur with the Attorney-General of Porto Rico, in the opinion that the exemption granted by the act of the legislative assembly of Porto Rico is restricted to the railroad and property of the grantee at the date of the approval of the act, and that subsequently built or acquired by such original grantee. The *Compañía de los Ferrocarriles de Puerto Rico* (The Porto Rico Railroad Company) was originally operated under a concession granted by the Spanish Government in 1888. After the United States occupation various negotiations were had between the company and our government. A franchise was granted to the company in July, 1901, in which was a clause exempting the railroad and its property from taxation for twenty-five years. This franchise, under advice of the Attorney-General of the United States (23 Op. 491), was disapproved by the President, principally on account of this exempting clause.

A new franchise was granted October 28, 1901, in which, section 5, it was stated:

"The said grantee shall be exempt from all insular and municipal or local taxation of every name and nature for a period of twenty-five years from the date of the acceptance by it of this grant: *Provided, however,* That said exemption shall not become effective or operative until the legislative assembly of Porto Rico shall by law duly authorize such exemption."

This franchise was approved by the President in the following language:

"The foregoing ordinance is approved, subject to the qualification that the approval shall not have the effect to exempt the franchise from taxation until such exemption shall have been authorized by the legislative assembly of Porto Rico, nor be understood as infringing upon the prerogative of the legislative assembly of Porto Rico to exercise its sovereign power in regard to taxation.

"THEODORE ROOSEVELT."

On February 4, 1902, the legislative assembly of Porto Rico passed the act, above quoted, granting exemption.

The act contains some very peculiar provisions. While the Porto Rican Railroad Company is the original grantee, it is declared in the thirteenth section of the grant:

"The term 'grantee' as herein used shall extend to and include the grantee, its successor and assigns, and in case of the transfer of its property by the grantee, either by its own act or by act of law, the purchaser or assignee shall be bound by all the terms and conditions hereof of every name and nature. It is expressly understood and agreed that all the property interests and rights of the grantee, including this franchise and all the benefits and advantages accruing thereunder, but excluding any charter or franchise granted by royal order or decree as hereinbefore mentioned, may be assigned, sold, transferred, and set over unto the railroad company, association, or corporation the organization of which under the laws of one of the States of the United States is now contemplated for the express purpose of taking this franchise and the property rights of the grantee."

Mr. Brown states that this "evidently refers to the American Railroad Company of Porto Rico, which was organized subsequent to the granting of the franchise and which has taken over, under a peculiar sort of contract, all of the property in Porto Rico of the *Compañía de los Ferrocarriles de Puerto Rico*."

This contract was executed March 22, 1902. Mr. Brown says:

"* * * the arrangement between the two companies is in effect only one of lease whereby the American Railroad Company of Porto Rico is to use all of the property of the *Compañía de los Ferrocarriles de Puerto Rico*, operating the railroad already established, extending the lines, and purchasing new and additional equipment out of funds which it will raise and which are to be repaid to it by the *Compañía de los Ferrocarriles de Puerto Rico*, out of earnings of the railroad, in annual instalments running during the life of the contract, and the new equipment is to belong to the *Compañía de los Ferrocarriles de Puerto Rico* at the

expiration of the contract, when it will be fully paid for. There is no transfer of title to any property from the *Compañía de los Ferrocarriles de Puerto Rico* to the American Railroad Company of Porto Rico, and no assignment of property or franchise attempted. On the contrary, the property purchased by the American Railroad Company of Porto Rico is to pass to the *Compañía de los Ferrocarriles de Puerto Rico.*"

On July 22, 1902, the executive council by ordinance authorized the "*Compañía de los Ferrocarriles de Puerto Rico*" to assign to Henry De Ford, his heirs, executors, administrators, and assigns and to the proposed organization to be known as the "*American Railroad Company of Porto Rico, Central Aguirre, operator,*" the right to construct, maintain, and operate the railroad line from Ponce to Guayama authorized by the ordinance of the executive council of October 28, 1901, above mentioned. This ordinance of assignment was approved by the President in October, 1902.

On April 2, 1904, certain parties obtained a charter for the Ponce and Guayama Railroad Company under the laws of the State of New Jersey, and the executive council by ordinance authorized the transfer—

"* * * to that company of the franchise rights and exemptions theretofore granted to the *Compañía de los Ferrocarriles de Puerto Rico* for the construction and maintenance of a railroad between Ponce and Guayama, and also the transfer and assignment of said franchise rights and exemptions from the American Railroad Company of Porto Rico, the American Railroad Company of Porto Rico, Central Aguirre, operator, and its shareholders and Henry De Ford, to the said Ponce and Guayama Railroad Company."

Under these authorities a deed was executed—

"* * * by the American Railroad Company, Central Aguirre, operator, and Henry De Ford, conveying all the rights, property, and interests of every kind, including franchise rights for the construction of the line of railway between Ponce and Guayama. The individual stockholders of the American Railroad Company of Porto Rico,

Central Aguirre, operator, and also the representatives of the Central Aguirre Syndicate, as well as the *Compañía de los Ferrocarriles de Puerto Rico* and the American Railroad Company of Porto Rico, joined in the foregoing conveyance and ratified the transfer to the Ponce and Guayama Railroad Company."

The Ponce and Guayama Company and the American Company built lines contemplated by the franchise of October, 1901. At the time—

"* * * the franchise of October 28, 1901, was granted to the *Compañía de los Ferrocarriles de Puerto Rico* it had under operation some two hundred and three (203) kilometers of railway. Since that date there have been constructed by the American Railroad Company of Porto Rico about one hundred and forty-three (143) kilometers of railway, including branches, part of which was authorized by the ordinance of October 28, 1901, and part by subsequent franchises—some of which are in favor of the *Compañía de los Ferrocarriles de Puerto Rico*, and some in favor of the American Railroad Company of Porto Rico—but all of this one hundred and forty-three (143) kilometers of railway was constructed or acquired by the American Railroad Company of Porto Rico, and not by the *Compañía de los Ferrocarriles de Puerto Rico*."

It is contended by the Attorney-General of Porto Rico that with the exception of the lines built by the Porto Rican Railroad Company, the Ponce and Guayama Company, and the American Company are not exempted from taxation on the properties constructed by them. I agree with that contention. It is true that the language of the act of the legislative assembly is broader than the language of the franchise of October, 1901. But still, by a strict construction of the act, the terms "successors and assigns" must be confined to their relation to the lines and property heretofore and hereafter "built and acquired by it," the Porto Rican Railroad Company. The history of the transaction shows that this immunity was personal to that company and was induced largely by reason of the concessions made to it by the Spanish Government.

While the Porto Rican Railroad Company has maintained its corporate existence, yet the construction of the roads referred to by the Ponce and Guayama and the American companies, was accomplished in an entirely different manner from that contemplated in the franchise of October, 1901.

It is well settled by the decisions of the Supreme Court that a grant of immunity from taxation must be construed most strongly against the grantee, and will not be held to be assignable in order to pass to a purchaser on a sale, under mortgage or otherwise, without express authorization. A "mortgage or franchise" of a railroad company was held not to carry immunity from taxation granted to the mortgagor in *Morgan v. Louisiana* (93 U. S. 217), such immunity being a mere personal privilege not transferable to others.

"The franchise of a railroad corporation," said the court in that case, "are rights or privileges which are essential to the operation of the corporation and without which its road and works would be of little value; * * * They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction."

In *Railroad Company v. Commissioners* (103 U. S. 1), a company was invested with "all the rights and powers necessary 'to the construction and repair' of its railroad and for that purpose was to 'have and use all the powers and privileges'" and be subject to the obligations contained in certain sections chartering the Baltimore and Ohio Railroad Company. One of those sections exempted the property of that company from taxation. It was held that the grant to the company at bar was not—

"a grant of all the powers and privileges of the Baltimore and Ohio Company named in those sections, but only of such as were necessary to carry into effect the objects for which the new company was incorporated * * *. The

powers and privileges of the Baltimore and Ohio Company, therefore, which the new company was permitted 'to have in use,' were such as were necessary to the construction, repair, and use of its railroad. Exemption from taxation is not one of these privileges. It is undoubtedly a privilege, but not necessary either to the construction, repair, or operation of a railroad."

In *Chesapeake and Ohio Railway Company v. Miller* (114 U. S. 176) it was held that the provisions in the act incorporating the railway company, exempting it from taxation on its property, were personal to that company and did not inhere in the property so as to pass to a purchaser; and to the same effect is *Picard v. East Tennessee, Virginia and Georgia Railroad Company* (130 U. S. 637), where it was reaffirmed that legislative immunity from taxation is a personal privilege not transferable and not to be extended beyond the immediate grantee, unless otherwise so declared in express terms. Tested by these principles the grant to the *Compañía de los Ferrocarriles de Puerto Rico* of exemption from taxation upon "the railroad lines and property heretofore built and acquired by it, as well as the railroad lines and property hereafter to be built and acquired by it," must be held not applicable to railroad lines and property built or acquired by any other company than the *Compañía de los Ferrocarriles de Puerto Rico*.

The attorney-general of Porto Rico in his opinion says:

"The only property of the Ponce and Guayama Railroad Company which ever did belong to the *Compania de los Ferrocarriles de Puerto Rico* is the franchise for a line of railroad from Ponce to Guayama, which it obtained from other persons and not direct from the *Compania de los Ferrocarriles de Puerto Rico*. No part of the railroad line, and none of the property of the Ponce and Guayama Railroad Company, ever belonged to the *Compania de los Ferrocarriles de Puerto Rico*, and hence no exemption from taxation ever attached to it under the act of the legislative assembly of Porto Rico, which attempts to exempt the railroad lines and property of the *Compania de los Ferrocarriles de Puerto Rico*."

And again: The American Railroad Company of Porto Rico—"is in no sense the successor or assignee of the *Compania de los Ferrocarriles de Puerto Rico*. It is at most a lessee or occupant of that portion of the railroad property which the *Compania de los Ferrocarriles de Puerto Rico* had at the time of making the contract with it. The title to this property and the franchises, however, remain in the *Compania de los Ferrocarriles de Puerto Rico*, and have never been sold or assigned to the operating company. The new property acquired by the American Railroad and the railroad lines built by it were acquired and built with its own funds, and under the contract do not become the property of the *Compania de los Ferrocarriles de Puerto Rico* until paid for out of the earnings of the road."

Without a more extensive review of the authorities referred to by the Attorney-General of Porto Rico, I am of the opinion that they abundantly sustain him in the conclusion that upon the facts stated, the exemption from taxation contained in the act of the legislative assembly of Porto Rico of February 4, 1902, is restricted as above stated, and does not extend to the Ponce and Guayama Railroad Company, nor to any other railroad or property constructed or acquired by any company other than the *Compania de los Ferrocarriles de Puerto Rico*.

Very respectfully, yours,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

NATURALIZATION—CITIZENSHIP—RESIDENCE IN NATIVE
COUNTRY FOR TWO YEARS—STATUS OF WIFE.

A native of Syria who was naturalized in the United States and later returned to his native country where he married a Syrian woman and remained in that country for more than two years and then came back to the United States, bringing his wife with him, did not thereby cease to be a citizen of the United States. His wife is also to be deemed a citizen and is not subject to exclusion under the immigration laws, providing she might herself be lawfully naturalized.

The act of March 2, 1907 (34 Stat. 1228), regarding expatriation, is limited to naturalized citizens while residing in foreign countries beyond the period stated in that act, the object being to relieve the Government from the obligation of protecting such citizens after a residence abroad of sufficient duration to raise the presumption that they do not intend to return to the United States.

The act does not apply to citizens who return to the United States, as the act of returning rebuts the presumption of noncitizenship.

DEPARTMENT OF JUSTICE,

December 1, 1910.

SIR: I beg to acknowledge the receipt of your letter of the 17th ultimo, requesting my opinion upon the question therein presented, as follows:

"Jebzan Gossin, a native of Syria, was naturalized in the United States in 1905. Thereafter, about 1907, he returned to his native country, and was married to a Syrian woman. After remaining in that country for more than two years, he came back to the United States, bringing his wife, Nazara Gossin, with him. Upon reaching the port of New York, the 10th of this month, the man was admitted, but it was found that the woman had trachoma, and she is being detained pending a determination of her right to enter, which seems to hinge upon the question whether her husband is now a citizen of the United States. If he is, then, under section 4 of the expatriation act of March 2, 1907 (34 Stat. 1228), it would appear that his wife is a citizen, and, as such, is not subject to exclusion under the immigration laws. Looking merely at the letter of section 2 of the act referred to, it would seem that, being a naturalized citizen and having resided for more than two years in the country from which he came, there is raised the presumption that he has ceased to be an American citizen, which presumption has not been rebutted in accordance with the proviso contained in that section, and his wife, being an alien, is subject to exclusion.

"However, in view of the title of the act, and the fact that the proviso requires that the presumption shall be overcome by presenting certain evidence to a 'diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe,' I am in doubt as to whether the statute applies to a person

who is now in the United States, or who may be seeking admission as a citizen after having resided for more than two years in the country from which he came.

"I have the honor to request, therefore, that you favor me with an expression of your opinion as to the citizenship status of the above-named Nazara Gossin. Inasmuch as the person concerned is being detained in the meanwhile at Ellis Island, an opinion at an early date will be appreciated."

Section 1994 of the Revised Statutes provides:

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

Nothing to the contrary appearing, I assume that Nazara Gossin "might herself be lawfully naturalized," and hence is to be deemed a citizen upon her marriage to a citizen of the United States. (27 Op. 507, and cases cited.) Her present citizenship status depends, therefore, upon that of her husband; and, under the facts presented, he is now a citizen unless his citizenship has been forfeited under the act of March 2, 1907 (34 Stat. 1228).

That act is entitled "An act in reference to the expatriation of citizens and their protection abroad." The second section of the act provides:

"SEC. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war."

Pursuant to the last paragraph of the section quoted, the Department of State has issued a circular to diplomatic and consular officers of the United States, dated April 19, 1907, reading as follows:

"When a naturalized citizen of the United States has resided for two years in the country of his origin, or for five years in any other country, this fact creates a presumption that he has ceased to be an American citizen, but the presumption may be overcome by his presenting to a diplomatic or consular officer proof establishing the following facts:

"(a) That his residence abroad is solely as a representative of American trade and commerce, and that he intends eventually to return to the United States permanently to reside; or,

"(b) That his residence abroad is in good faith for reasons of health or for education, and that he intends eventually to return to the United States to reside; or,

"(c) That some unforeseen and controlling exigency beyond his power to foresee has prevented his carrying out a bona fide intention to return to the United States within the time limited by law, and that it is his intention to return and reside in the United States immediately upon the removal of the preventing cause.

"The evidence required to overcome the presumption must be of the specific facts and circumstances which bring the alleged citizen under one of the foregoing heads, and mere assertions, even under oath, that any of the enumerated reasons exist will not be accepted as sufficient."

I infer from your statement of the facts that before leaving Syria Jebran Gossin did not make proof before a consular or diplomatic officer of the United States as provided by the regulations of the State Department. The question then is whether the presumption as to noncitizenship raised by the act by reason of his residence abroad continues notwithstanding his return to the United States.

In my judgment the act was not intended to apply to a case of this kind, but its operation is limited to naturalized citizens while residing in foreign countries. The purpose of the act is, I think, simply to relieve the Government of

the obligation to protect such citizens residing abroad after the limit of two or five years, as the case may be, when their residence there is not shown to be of such a character as to warrant the presumption that they intend to return and reside in the United States and thus bear the burdens as well as enjoy the rights and privileges incident to citizenship. Until the time limit has expired the presumption is that they intend to return; after that time it is presumed that they do not intend to return, and it becomes necessary, in order that they may continue to have this Government's protection, to show affirmatively, in accordance with the regulations of the State Department made in pursuance of the act, that it is their bona fide intention to return to the United States to live. Obviously, therefore, the essential thing under the act is the intention to return to and reside in the United States. The highest proof of such an intention is the actual return and residence of such a person, amounting as it does to a demonstration. It is not to be held, therefore, that the act would apply to a case of this kind unless the language used or the circumstances attending its passage compel such a conclusion. The title, language, and history of the act, however, support the views just stated as to its construction.

As above stated, the act is entitled "*An act in reference to the expatriation of citizens and their protection abroad,*" and it appears that it was passed at the instance of the Department of State. In reporting the bill to the House, the Committee on Foreign Affairs said (H. Report 6431, 59th Cong., 2d sess.):

"This bill follows in its general lines the recommendations of the Department of State. * * *

* * * * *

"Perhaps the most important provision of the bill is desired by the State Department to guard against complications in which this country has often been involved. All desire that the flag of this country should protect an American citizen to the fullest extent. But none of us desire that some foreigner who does not intend to cast his lot permanently with us should endeavor to avail himself of the flag as a fraudulent protection. Many foreigners come here,

become naturalized, and then return to their own countries or migrate to other parts of the world without any intention of returning to this country. They have not become citizens in good faith, but they seek to avail themselves of the protection of our citizenship in avoiding responsibility to which they may be subjected in other parts of the world.

"This is not right. The citizenship of the United States should not be sought or possessed for commercial or dishonest ends. To guard against this evil, this bill provides that a naturalized citizen who leaves this country and dwells elsewhere continuously for five years shall be presumed to have abandoned his citizenship. This presumption can be overcome, but such a provision as this would be a great assistance to the Department of State, would avoid possibilities of international complications, and will prevent those who are not entitled to its protection from dishonestly hiding under the American flag."

As further showing the purpose of the act, the remarks of Mr. Perkins, who reported the bill from the committee and had charge of it in the House, are pertinent. In the course of debate it was said (Cong. Rec., vol. 41, pt. 2, p. 1466):

"Mr. BENNET of New York. Mr. Speaker, I entirely agree with the gentleman from Colorado [Mr. Bonyng] as to section 3. I think it is too broad. In addition to the consideration that he urged upon the House, there is also the consideration of property rights and of property rights inhering in American-born citizens who might take through these foreign-born naturalized citizens. This bill will apply to a man who has now been abroad four years and eleven months, and if he remains abroad the other month he would be forced, under this statute, to become no longer a citizen of the United States, but a citizen of the country where he was.

"Mr. PERKINS. Allow me to correct the gentleman. That certainly is not the result of the statute at all.

"Mr. BENNET of New York. Why not?

"Mr. PERKINS. The statute provides that, having remained there five years continuously, there shall be a presumption which, unless he satisfies the officers of the State

Department, their consuls, or ministers to the contrary, would authorize the State Department to refuse to extend him protection. It can not affect any other rights, which, of course, he can present in court. No presumption is conclusive on a court. It is a mere presumption, but the presumption would protect the State Department. That is the object of the bill and the result of the bill and the only result of it."

The fact that the act only authorizes the submission of proof for the purpose of overcoming the presumption as to noncitizenship raised thereby to diplomatic and consular officers of the United States, who necessarily reside abroad, and makes no provision in respect to naturalized citizens coming within the purview of the act who return to the United States, is a further evidence that Congress did not intend the act to apply to a case of this kind. To hold that it did, would produce the absurdity of a naturalized citizen seeking to reenter the United States being held to have ceased to be such, and possibly denied admission, because he had failed to make proof before the proper diplomatic or consular officer abroad of his intention to return to the United States.

As above shown, the presumption as to noncitizenship raised by the act is created for the purpose of relieving the State Department of protecting naturalized citizens abroad when the conditions are apparently such as to indicate that they have no bona fide intention to return to and reside in the United States. When a citizen returns to the United States, the necessity for such protection no longer exists, and it is fair to assume that with the cessation of the necessity the presumption created by the act also ceases.

In my opinion, therefore, under the facts stated, Jebran Gossin has not lost his citizenship, and his wife, Nazara Gossin, upon the assumption above stated that she herself might be lawfully naturalized, is also to be deemed a citizen.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF COMMERCE AND LABOR.

REMOVAL OF FLOATING DRY DOCK FROM ALGIERS, LA.,
TO GUANTANAMO, CUBA.

The President has no power, in the absence of an emergency making such action imperative for the protection of the interests of the Government, to remove to the naval station at Guantanamo, Cuba, the floating dry dock which was constructed and located at the naval reservation at Algiers, La., under the provisions of the act of May 4, 1898 (30 Stat. 379).

DEPARTMENT OF JUSTICE,
December 7, 1910.

SIR: I have the honor to reply to your letter of November 23, 1910, reading as follows:

"This department has in contemplation the removal of a floating dry dock from Algiers (New Orleans), La., where it is now located, to the naval station, Guantanamo, Cuba, at which latter station it would, in my opinion, after personal consideration and investigation, be better adapted for fulfillment of the object for which it was constructed. Some doubt, however, exists as to the legality of making the contemplated change in the location of this dock, because of the provision in the act of May 4, 1898, authorizing its construction, that said dock was 'to be located at the naval reservation at Algiers, Louisiana.'

"I have the honor to request your opinion as to whether the language quoted from the act of May 4, 1898, or any other provision of law, prohibits the removal of the floating dry dock in question from Algiers, La., and the locating of same, either temporarily or indefinitely, at the naval station, Guantanamo, Cuba."

The provision to be construed is contained in the naval appropriation act approved May 4, 1898 (30 Stat. 369, 379), under the heading "Repairs and preservation at navy yards and stations," and reads as follows:

"Toward the construction of one steel floating dock of domestic manufacture which shall be a combined floating and graving dock, two hundred thousand dollars, said dock to be located at the naval reservation at Algiers, Louisiana, to be capable of lifting a vessel of fifteen thousand tons displacement, and twenty-seven feet draft of

water, to cost, including moorings and wharf, eight hundred and fifty thousand dollars."

The final appropriation for the completion of this dry dock was made by the naval appropriation act approved June 7, 1900 (31 Stat. 684, 696), as follows:

"Dry dock, Algiers, Louisiana: To complete floating dry dock for Algiers, Louisiana, six hundred and fifty thousand dollars, to be immediately available."

In determining the question presented, it is necessary to consider the previous legislation of Congress, which culminated in the authorization of the construction of a floating dry dock at Algiers, La.

The naval appropriation act of September 7, 1888 (25 Stat. 458, 463), contained the following provision under the heading "Bureau of Yards and Docks:":

"For the expenses of a commission of three officers, to be appointed by the Secretary of the Navy, to report as to the most desirable location on or near the coast of the Gulf of Mexico and the south Atlantic coast for navy-yards and dry docks and for the expenses of sounding and surveying and estimating expenses, fifteen thousand dollars.
* * *

The naval appropriation act approved June 30, 1890 (26 Stat. 189, 196), provided:

"And the President be, and he hereby is, required to appoint a commission composed of two competent naval officers, one competent army officer, and two competent persons from civil life, whose duty it shall be to select a suitable site, having due regard to commercial and naval interests, for a dry dock at some point on the shores of the Gulf of Mexico or the waters connected therewith; and having selected such site shall if upon private lands, estimate its value and ascertain as nearly as practicable the cost for which it can be purchased or acquired, and of their proceedings and action make full and detailed report to the President, and the President shall transmit such report with his recommendations to Congress. That to defray the expenses of such commissions the sum of fifteen thousand dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated."

Provision for the establishment of a dry dock at Algiers, La., in pursuance of the recommendations of the above-mentioned commissions, was first made by the act of March 3, 1893 (27 Stat. 715, 722), as follows:

"Dry dock, Algiers, Louisiana: Toward the establishment of a dry dock on the government reservation, near Algiers, Louisiana; for plans and specifications, and for the acquisition of such additional land as may be necessary in the discretion of the Secretary of the Navy, in accordance with the recommendations of two commissions appointed by the President under the provisions of an act approved September seventh, eighteen hundred and eighty-eight, and the act approved June thirtieth, eighteen hundred and ninety, respectively, twenty-five thousand dollars."

The next appropriation for this purpose was made by the naval appropriation act of July 26, 1894 (28 Stat. 123, 130), which contained the following clause:

"Dry dock at Algiers, Louisiana: For the purpose of completing the purchase of additional lands necessary for the establishment of a dry dock at Algiers, Louisiana, cost of advertising, plans and specifications for said dry dock, and expenses of judicial proceedings instituted for the condemnation of such additional lands, twenty-three thousand and twenty-five dollars and three cents."

The foregoing appropriations, it will be noted, contemplated the establishment of a stationary dock at Algiers. This plan appears to have been abandoned, however, and provision made for the construction of a floating dry dock at that place by the act of May 4, 1898, above set forth.

It will be observed that the act of May 4, 1898, requires "said dock to be located at the naval reservation at Algiers, Louisiana," and that the appropriation made by the act of June 7, 1900, is "to complete floating dry dock for Algiers, Louisiana." It is manifest that on their face these statutes negative the idea of the power of the President to locate the dock elsewhere or remove it when built. It is suggested, however, in the memorandum of the Judge-Advocate-General which accompanies your letter, that the language referred to was intended to be merely "descriptive of a thing" and not a permanent limitation upon the power of

the Executive. The argument in favor of the authority of the President to authorize the removal of the dry dock to a different station, at least temporarily, if the interests of the service in his judgment should so require, is very forcibly presented by the Judge-Advocate-General, as follows:

“Arguments and decisions bearing upon the removal of objects, in their nature fixed and permanent, constructed under specific appropriations by Congress, can not be regarded as controlling, or even as applicable, to the present question. A floating dry dock, the same as a vessel, is constructed with a view to its removal at such times and to such places as may be deemed necessary or advisable, and, as shown by the general trend of legislation extending through a long period of years, it has not been the policy of the Congress to place restrictions upon the power of the Executive as to the one any more than as to the other. Thus we find that in the act of September 7, 1888, provision was made for ‘one adjustable stern-dock, to be constructed at such place as the Secretary of the Navy may determine, thirty thousand dollars.’ Again, by the act of June 7, 1900, provision was made for the ‘purchase from the Government of Spain, for a sum not to exceed \$275,000,’ a floating dry dock belonging to that Government, and an appropriation of \$300,000 made by the same act ‘for the purchase of said dock and for transferring and mooring the same in such location as may be determined upon by the President.’ The floating dry dock located at the naval station, Olongapo, P. I., was first appropriated for by the act of July 1, 1902, under the heading ‘Naval station, Cavite, Philippine Islands,’ as follows: ‘Toward the purchase or construction of a floating steel dry dock (of American manufacture) (to cost not to exceed one million two hundred and twenty-five thousand dollars), two hundred thousand dollars.’ Appropriations for the continuation of this floating dock were also made under the caption ‘Naval station, Cavite, Philippine Islands.’ When completed, however, the dock was located by the Executive at the naval station, Olongapo, P. I., and that Congress was aware of this action, and did not regard it as contrary to the purpose of the appropria-

tions, is shown by the fact that the act of June 29, 1906, under the heading, 'Naval station, Olongapo, Philippine Islands,' made provision for a 'wharf for floating dry dock, sixty-five thousand dollars.'

"Very analogous to this question is that of the location of the light-ships authorized from time to time by Congress. These light-ships had been removed by the Executive to places other than those for which they were provided (24 Stat. 159). Accordingly, Congress, by act approved May 27, 1908 (35 Stat. 331), prohibited such action in the future by the following clause:

"'Hereafter no light-ship shall be removed from the place designated for its station, in the act authorizing its construction, and be stationed elsewhere except upon express authority of Congress.'

"This prohibition was repealed by the next Congress (act June 17, 1910, 36 Stat. 537), from which it may be inferred that Congress concluded to leave to the Secretary of Commerce and Labor the power formerly exercised by him of removing light-ships from the places designated for their stations in the acts authorizing their construction.

"The discretion of the President, as commander in chief of the Navy, to make such disposition of the personnel and material of the naval service as to him may seem advisable, is, of course, subject to legislative restrictions by Congress enacted under its constitutional authority to 'provide and maintain a navy.' Unless, however, such restrictions be explicit and wholly free from doubt, they should not be regarded as intended to hamper or embarrass the Executive in the performance of its duties. As we have already seen, of four floating docks provided for by Congress, the location of two was left absolutely in the discretion of the Executive. The third was appropriated for under the caption of a specific naval station, but was nevertheless located at a different station in the same vicinity, and the action taken by the Executive in the matter met with the approval of Congress. No prohibition is explicitly made in the appropriation for the fourth one—that located at Algiers, La.—with respect to its removal, and the words 'to be located at the naval reservation at

Algiers, Louisiana,' may well be regarded as merely descriptive of the subject-matter and intended to identify the dock for which provision was being made. In any event, the same authority, at least, exists in the Executive to remove this dock as is possessed with respect to the removal of light-ships to places other than those designated by Congress in the acts appropriating therefor."

The circumstances in connection with the authorization of the dry dock at Algiers, however, are such as to make it impossible for me to concur in the view as to the power of the President, without further authority from Congress, to change the location of that dock. The provision of the acts of September 7, 1888, and June 30, 1890, above quoted, authorizing the appointment of commissions to determine upon a site for the location of a dry dock on the shores of the Gulf of Mexico indicate that the matter of the location of such a dock was considered one of great importance by Congress. By the act of September 7, 1888, the commission thereby authorized was directed "to report as to the most desirable location on or near the coast of the Gulf of Mexico and the south Atlantic coast for navy-yards and dry docks," and by the act of June 30, 1890, it was made the duty of the commission authorized thereby "to select a suitable site, having due regard to commercial and naval interests, for a dry dock at some point on the shores of the Gulf of Mexico or the waters connected therewith."

It is true that these acts had reference to a stationary dry dock, while it appears that by the act of May 4, 1898, Congress abandoned the stationary for a floating dry dock, which, it is suggested, was necessarily authorized with a view to its movable qualities. But the language of the act of May 4, 1898, and the reasons which appear to have actuated Congress in making a change from a stationary to a floating dry dock do not support the view that Congress intended the location of the dock to be changeable at the discretion of the President.

In his report to Congress for 1897, the Secretary of the Navy, referring to the lack of docking facilities, said that in August of that year he had appointed a special board to

examine the matter, whose report would be forwarded to Congress as soon as it met; that a plan for the location of additional government docks recommended by this board as a result of its investigations was comprehensive and should be substantially carried out, and that when completed it would give the necessary facilities demanded by the extensive coast line of our country. He further said (Ann. Rept., Navy Dept., 1897, pp. 13-14):

"There are seven strategic divisions of our coast: First, from the Bay of Fundy to Cape Cod; second, from Cape Cod to Sandy Hook; third, from Sandy Hook to Cape Henry; fourth, from Cape Henry to Cape Sable; fifth, the coast line bordering on the Gulf of Mexico; sixth, the southern portion of the Pacific coast; and seventh, the northern portion. There should be docks and repair shops in each division, and these should be placed, as far as possible, at great commercial and industrial centers, not only because workmen and material can be obtained more readily and more reasonably at such points, but also because such points require and will have, from their importance to the country, a strong land defense; and, as the docks also require a strong defense, one set of fortifications will cover both civil and military property. In the great commercial centers also, from which ply large transocean steamers, the Government will be able to derive some revenue from accommodating them in its docks.

"The board in its summary recommends as sites for 'docks urgently necessary' Boston, New York, Norfolk, Port Royal, New Orleans, and Mare Island. The ground on which they proceeded in this recommendation appears in the following quotation from their report:

"Acts of Congress have repeatedly required that navy-yards and dry docks, their most essential and costly structures, shall be located with due regard to the commercial as well as the naval interests, and commissions have been from time to time appointed to select such sites. The reports of these commissions have furnished the board valuable information in the discharge of its duties. In its instructions to these commissions the Navy Department has

formulated the special requirements of a site for a navy-yard to be—

“‘1. A situation upon a good harbor of sufficient size, depth, and accessibility for vessels of the largest size and heaviest draft.

“‘2. A favorable position with respect to the principal lines of defense.

“‘3. A local security from water attack due to position and natural surroundings.

“‘4. Ample water frontage of sufficient depth and permanence and with currents of moderate rapidity.

“‘5. A favorable position with respect to the lines of interior communication (by rail or otherwise) with the principal sources of supply.

“‘6. That the character of the ground shall be suitable for the construction of excavated docks and basins and for heavy structures.

“‘7. Proximity to centers of labor and supplies of material.

“‘8. Healthiness of the climate and its suitability for outdoor labor.

“‘9. The existence in the vicinity of an ample supply of good potable water.’

“Upon careful consideration of the report and the supplementary report of the board, and of the whole subject-matter, the department recommends that action be taken by initial appropriations—at a total ultimate cost for the several improvements recommended less than that of one additional first-class battle ship, which is now of less importance than additional docks—to start at once the following works:”

He then proceeds to recommend the construction of several dry docks at various places, among others—

“That at Algiers, New Orleans, a steel floating dock, with necessary wharf and moorings, be constructed.”

The report of the Committee on Naval Affairs accompanying the naval appropriation bill (H. R. Rept. 775, 55th Cong., 2d sess.) stated that “the committee authorize the construction of five dry docks, to be located at points

that have been recommended by the Secretary of the Navy."

When the naval appropriation bill came up in the House in Committee of the Whole, Mr. Boutelle, chairman of the Committee on Naval Affairs, said (31 Cong. Rec., 3183-3184):

"Mr. Chairman, I perhaps ought to make a reference to two other features of this bill. One of them is the matter of dry docks. The Secretary of the Navy in his annual report made certain specific recommendations of the very great importance of additional dry-dock facilities.

* * * * *

"The Committee on Naval Affairs have taken under consideration all of these recommendations, and after a long period of hearings by the subcommittee, of which the gentleman from California [Mr. Hilborn] is the chairman, they have recommended to the full committee and the full committee indorsed the provisions which are now in this bill for the erection of a dry dock at Portsmouth, N. H., where there is no dock now; for the erection of a new dock at Boston, where there is only an inferior and undersized stone dock; for the erection of an additional dock at League Island, Pa., our only fresh-water yard, unless Mare Island is called a fresh-water yard—the only fresh-water yard on the Atlantic coast * * * and for the construction of a steel floating dock at Algiers, La., opposite New Orleans, there being no facility of the kind now anywhere along the Gulf coast.

"Members will find the recommendations of the department in the annual report, and the committee have deemed it wise to make to the House these recommendations for additions in that regard."

The reasons for the change from a stationary to a floating dry dock were brought out in the following discussion in the House on the naval appropriation bill (31 Cong. Rec., 3190):

"Mr. MEYER, of Louisiana. * * *

"The bill of the committee has provided for five dry docks, to be constructed at Portsmouth, N. H., Boston, Mass., League Island, Pa., Mare Island, Cal., and Algiers,

(New Orleans), La., and makes an adequate appropriation for beginning the work. It is possible, indeed, that one or two other places might have been provided for, but it can not be doubted that the points chosen will result in the public good.

"This is unquestionably true in regard to the selection of New Orleans, for a dock on the Gulf coast is indispensable in the opinion of naval officers, and naval experts say emphatically that New Orleans is the true point to locate it.

"At one time a timber or concrete dry dock was favored for this place, but the naval board recommended in lieu of this 'a double-sided steel floating dock of the type known as the combined floating and graving self-docking dock, to be capable of lifting a war vessel of the largest size and deepest draft of water.'

* * * * *

"Mr. DRIGGS. I desire to ask him in relation to the number of dry docks. Last summer, as I remember it, there was a commission appointed and each denomination of docks was considered, and they provided for a certain number of docks. Does this bill provide for a less or a greater number?

"Mr. MEYER, of Louisiana. The bill provides for a smaller number of docks than the commission recommends. Their report sets forth six docks at various points as 'urgently necessary' and five as additional 'to place the docking facilities of the country on an adequate footing.'

"Mr. HILBORN. And one of them a floating steel dock.

"Mr. DRIGGS. Thank you.

"Mr. MEYER, of Louisiana. The reasons assigned by the board for preferring the steel floating dock are:

"1. Changes in water level from high and low river do not affect its operation.

"2. It is located in fresh water, and expense of maintenance will be small.

"3. Great depth of water within mooring distance of wharf

"4. Rapidity with which a floating dock can be constructed to meet the urgent need for a dock on the Gulf of

Mexico (ten months being the time estimated for its construction).’”

The history of the legislation in question shows that in providing for a floating instead of a stationary dry dock at Algiers, La., Congress was actuated by considerations other than that a floating dock might perhaps be transferred to some other place if deemed advisable. That possibility does not appear to have been even suggested. The selection of Algiers, La., as the most suitable place for the location of a dry dock for the benefit of the Gulf waters had been determined upon by Congress after careful consideration and having due regard to both “the commercial and naval interests” to be subserved. The change from a stationary to a floating dock was made not because its movable quality might enable it to be transferred from one place to another, but because that quality would counteract the effect of any changes in the level of the water; because being located in fresh water the expense of maintenance would be small; because of the great depth of water within mooring distance of the wharf; and because of the rapidity with which a floating dock could be constructed. It is to be observed that a floating dry dock, although it may be transferred from one place to another, is not constructed primarily for that purpose. Because of its great size and depth and absence of self-motive power, the transfer of such a dock would, doubtless, be both difficult and expensive. Further expense would also be entailed by the construction of the necessary wharf and moorings, for which the act in question also provides. Besides, if the dock at Algiers were transferred to Guantanamo, Cuba, it would, I assume, be located in salt water, whereas it appears to have been contemplated that as the dock for Algiers would be located in fresh water, the expense of its maintenance would be reduced. Furthermore, it will be observed from the report of the Secretary of the Navy, above quoted, that in locating dry docks and repair shops it was desirable to place them as far as possible “at great commercial and industrial centers, not only because workmen and material can be obtained more readily and more reasonably at such points, but also because such

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points require and will have, from their importance to the country, a strong land defense; and, as the docks also require a strong defense, one set of fortifications will cover both civil and military property."

It is clear that Congress had these considerations in mind when it directed the floating dry dock in question "to be located at the naval reservation at Algiers, Louisiana," and that the language used was directory and not merely descriptive. This being so, I do not think the power of the President as Commander-in-Chief of the Army and Navy would authorize him to disregard the mandate of Congress as to where the structure should be located, at least in the absence of an emergency making such action imperative for the protection of the interests of the Government, such as might arise in time of war or public danger. Your letter, of course, suggests no intention to disregard the wishes of Congress in this respect.

I have therefore to advise you that in my opinion the President is not empowered, under present conditions, to remove the dock from Algiers, La., to Guantanamo, Cuba.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

FOREST RESERVES—LANDS WITHDRAWN FROM ENTRY.

The principle announced in the opinion of Acting Attorney General Fowler (28 Op. 424), that lands withdrawn from entry with a view to their inclusion in a national forest constitute a "temporary forest reserve" within the meaning of the act of June 11, 1906 (34 Stat. 233), concurred in.

DEPARTMENT OF JUSTICE,

December 10, 1910.

SIR: I have given careful consideration to the several suggestions made in your letter of October 6, 1910 (B 13521 OL), wherein you request a reconsideration of the opinion of the Acting Attorney General rendered to you September 20, 1910. The opinion holds that lands withdrawn from entry with a view to their inclusion in a national forest constitute a "temporary forest reserve"

within the meaning of the act of June 11, 1906 (34 Stat. 233). Your suggestions, briefly summarized, are:

First. That the opinion ignores a class of reservations created by proclamation of the President which more nearly fit the term "temporary forest reserves" than do the lands that have merely been withdrawn from entry, viz, forest reserves "comprehending lands devoid of timber and intended to be (and which were) used for experimental purposes, in the planting of trees, etc."

Second. That the opinion affects the jurisdiction of your department, as heretofore understood and exercised, over such withdrawn lands and therein may operate seriously upon private interests which rest upon the validity of your acts; and

Third. That to extend the right of entry by metes and bounds to lands merely withdrawn, and which may likely be restored to the public domain, offends the general policy of allowing entries of public lands only in rectangular tracts and tends to inconvenience and confusion.

The first suggestion, if well grounded, would be strongly persuasive, but it is hardly borne out by the proclamations themselves. A careful examination of all proclamations creating or affecting forest reservations, from the first of them down to a time long subsequent to the act in question, reveals no instance in which the purpose of the reservation was expressed to be temporary, or may safely be inferred to have been so from the recitals, description of subject-matter, or general context of the proclamation. In this respect the proclamations are so substantially similar that one can not logically be distinguished from another. The proclamation instanced by you (35 Stat. 2120) recites that the lands restored were no longer required "for experimental forest purposes." The original proclamation (34 Stat. 3178) which created the reservation thus abolished is couched in the terms common to scores of others and affords no indication that its purpose differed from the purpose actuating the creation of forest reservations in general. The recitals are, first, a recital of the authority of the President to set aside forest reserves under section 24 of the act of March 3, 1891 (26 Stat. 1103), and, second, the following:

“And whereas, the public lands in the Territory of New Mexico, within the limits hereinafter described, are in part covered with timber, and it appears that the public good would be promoted by setting apart and reserving said lands as a public reservation.”

I take the explanatory recital of the later proclamation to mean that the land was originally set apart for the conduct of forestry experiments of a more or less general character, or with a view to the forestation or reforestation of that particular tract. From neither of these objects may it be inferred that the subsequent restoration was part of the original plan.

Of the other suggestions contained in your letter, that which concerns the respective jurisdictions of your department and the Department of Agriculture and the protection of private interests is, of course, important; but I do not believe that the opinion logically points to the results which you apprehend. Because lands merely withdrawn are regarded as temporary forest reserves for the special and limited purpose of the act of June 11, 1906, it by no means follows that they must be regarded as forest reserves for all purposes. The very existence of the distinction between the temporary and the permanent reserves—the distinction upon which depends the attribution of any meaning to the words “temporary forest reserves” in the act—rests in the fact that the former have not yet attained the status of lands definitely set apart to be used and administered as national forests. They may never reach that status. The jurisdiction conferred upon the Secretary of Agriculture by the act of February 1, 1905 (33 Stat. 628), cited by you, is essentially a jurisdiction to care for, supervise, and manage the national forests as distinct instrumentalities of the Government—as “going concerns”—and to execute certain laws relating to them. He is directed by that act to “execute, or cause to be executed, all laws affecting public lands heretofore or hereafter reserved under the provisions of section 24 of the act approved March 3, 1891, and acts supplemental to and amendatory thereof, *after such lands have been so reserved*,” excepting certain classes of laws left for execution by the Interior Department. The language here used distinctly

imports that the process of reserving a given area of land shall have been completed before the Secretary's functions shall come into play.

The laws which the Secretary is to execute are manifestly the laws which declare the general policy respecting forest reservations and govern their administration and use as such apart from the general mass of public lands. The object of the "temporary" reservation is to retain the lands withdrawn in *statu quo* until the President may inquire further whether they are lands suitable to be brought within the operation of those laws. Application of those laws before the inquiry has been ended and acted upon would not only defeat in part the presidential purpose, but would be inconsistent with the laws themselves, since they presuppose as a condition to their application to a given area of land that a definite and final decision of the President to set apart and reserve it for forestry purposes shall have been made and proclaimed. The duty and responsibility of creating forest reserves rests with the President. The preliminary withdrawal of lands through your action is but a step in the process of creating them. The withdrawn areas can not be said to come under the "supervision" of the Secretary of Agriculture or his department within the meaning of the act of February 15, 1901 (31 Stat. 790), until they shall have been definitely devoted by the President to the forest policy. The power which brings about such withdrawals may, of course, revoke them.

The foregoing observations appear to cover the various objections made in your letter save that which is based upon the inconvenience of allowing entries to be made otherwise than in accordance with the public surveys. This is an objection the ground for which may be in large measure removed in practice by cooperation between the two departments; but whether this be so or not it is an objection which goes rather to the wisdom of the act of June 11, 1906, than to the soundness of the Acting Attorney General's opinion.

Very respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE INTERIOR.

CHIEF CONSTRUCTOR IN THE NAVY—GRADE—VACANCY.

The resignation of Mr. Washington L. Capps, chief of the Bureau of Construction and Repair in the Navy Department, upon his completion of 30 years' service in the Navy, and his being commissioned, under the provisions of the naval appropriation act of June 24, 1910 (36 Stat. 607, 608), a chief constructor in the Navy, with the rank of rear admiral, did not create a new grade in the construction corps. No vacancy was created thereby in the grade of naval constructor, nor in the total number of naval constructors and assistant constructors provided by law.

The office of chief of bureau in the Navy Department is not designated by acts of Congress as a grade.

DEPARTMENT OF JUSTICE,
December 10, 1910.

SIR: The material facts giving rise to the request for an opinion contained in your letter of the 12th ultimo are stated by you as follows:

"From October 31, 1903, to and including September 30, 1910, the Chief of the Bureau of Construction and Repair in this department, with the title of chief constructor, was Washington L. Capps, whose actual position in the Navy was in the grade of naval constructor with the rank of captain on the latter date, and on which date he completed 30 years' service in the Navy. On October 1, 1910, he resigned his office as such chief of bureau, and on the same day, in accordance with the terms of a provision in the naval appropriation act approved June 24, 1910 (36 Stat. 607, 608), he was commissioned a chief constructor in the Navy with the rank of rear admiral, and he still remains on the active list."

The provision of the act of June 24, 1910, under which Mr. Capps was commissioned, reads as follows:

"The pay and allowances of chiefs of bureaus of the Navy Department shall be the highest shore-duty pay and allowances of the rear admiral of the lower nine; and all officers of the Navy who are now serving or shall hereafter serve as chief of bureau in the Navy Department and are eligible for retirement after 30 years' service, shall have, while on the active list, the rank, title, and emoluments of a chief of bureau, in the same manner as is already provided by statute law for such officers upon retirement by reason of

age or length of service, and such officers, after 30 years' service, shall be entitled to and shall receive new commissions in accordance with the rank and title hereby conferred."

The questions upon which you desire an expression of my views are stated by you as follows:

"1. Does the recent commissioning of Mr. Capps as a chief constructor in the Navy with the rank of rear admiral create a new grade in the construction corps of the Navy?"

"2. Does the same fact create a vacancy in the grade of naval constructor in the Navy with the rank of captain, and in the total number of naval constructors and assistant naval constructors as provided by law?"

Of the eight bureaus among which, under section 419 of the Revised Statutes, "the business of the Department of the Navy shall be distributed in such manner as the Secretary of the Navy shall judge to be expedient and proper," the fifth is "a Bureau of Construction and Repair." Section 421 requires the chiefs of these bureaus to be "appointed by the President, by and with the advice and consent of the Senate," and they hold their offices for the term of four years.

Section 423 provides that—

"The Chief of the Bureau of Construction and Repair shall be appointed from the list of officers of the Navy, not below the *grade* of commander, and shall be a skillful naval constructor."

An act of March 3, 1893 (27 Stat. 716), modifies this section by providing that—

"* * * any naval constructor having the rank of captain, commander or lieutenant commander shall be eligible as Chief of the Bureau of Construction and Repair."

Section 1471 of the Revised Statutes, as amended by section 7 of the navy personnel act of March 3, 1899 (30 Stat. 1005), provides that the Chief of the Bureau of Construction and Repair, when that office is filled by an officer below the "rank" of rear admiral, shall have the "rank" of rear admiral while holding that "position," and shall have the "title" of chief constructor.

Sections 1402 and 1403 of the Revised Statutes authorize the President to appoint naval constructors and assistant naval constructors, and section 10 of the navy personnel act, *supra*, provides:

“SEC. 10. That of the naval constructors five shall have the *rank* of captain, five of commander, and all others that of lieutenant commander or lieutenant. Assistant naval constructors shall have the *rank* of lieutenant or lieutenant (junior grade). Assistant naval constructors shall be promoted to the *grade* of naval constructor after not less than eight or more than fourteen years’ service as assistant naval constructor: *Provided*, That the whole number of naval constructors and assistant naval constructors on the active list shall not exceed forty in all.”

The navy appropriation act of July 1, 1902 (32 Stat. 662, 683), authorizes the appointment of six additional assistant naval constructors, and a further increase of twenty-nine naval constructors and assistant naval constructors is provided for in the appropriation act of March 3, 1903 (32 Stat. 1177, 1197), “in all, seventy-five.”

As stated in an opinion by one of my predecessors concerning grades in the Navy (16 Op. 414, 416), “grade expresses one of the divisions or degrees in the particular department or branch of the service according to which offices therein are classified or graded,” and, as I have heretofore pointed out (27 Op. 376), the office of chief of bureau in the Navy Department is not designated in the acts of Congress as a *grade*. On the contrary, in section 421 of the Revised Statutes it is called an “office,” and in section 1471 a “position;” section 423 originally provided it must be filled by appointment “from the list of officers of the Navy not below the *grade* of commander;” by section 1471 the Chief of the Bureau of Construction and Repair has the “title” of chief constructor; under the act of March 3, 1899, *supra*, the incumbent, if an officer below the rank of rear-admiral, has that “rank” while holding the office, and the act of June 24, 1910, provides that the “pay and allowances” of chiefs of bureaus “shall be the highest shore-duty pay and allowances of the rear-admiral of the lower nine.”

It was therefore held, in my opinion of May 26, 1909 (27 Op. 376, 379), that when an officer of the Navy holding the position of chief of bureau with the title of engineer in chief is retired from active service by reason of disability, and, in pursuance of the provisions of sections 1448-1453 of the Revised Statutes, placed upon the retired list "of officers of the grade" to which he belonged at the time of his retirement, he is not retired as a chief of bureau or engineer in chief, for the reason that "such office is not a grade."

The provision of the act of June 24, 1910, applicable to the case of Mr. Capps has been construed in two previous opinions. The first, an informal opinion addressed to you on July 9 last,¹ holds that there is nothing in that act to alter the above-mentioned decision that the office of chief of bureau is not a grade. This opinion, however, was dealing with the retirement of a person who, without having served 30 years, had ceased to be a chief of bureau and returned to general duty for a time before he became eligible for retirement. The other, rendered September 27 last (28 Op. 429), advised you that the "rank, title, and emoluments" conferred by the act are not restricted to the period during which an officer who is eligible for retirement after 30 years' service remains chief of bureau, but continues as long as he is on the active list.

In the present case Mr. Capps, while serving as Chief of the Bureau of Construction and Repair, became eligible to retirement after 30 years' service. This entitled him, under the act of June 24, 1910, as construed in the above-mentioned opinions, to "the rank, title, and emoluments of a chief of bureau" so long as he remains on the active list, and it appears that he has received the new commission which that act directs in such cases. In order to answer your inquiries, it is necessary to go further than was required by the facts considered in my previous opinions and determine whether, in enacting the statute in question, it was the intention of Congress that the concurrence of all the circumstances just stated as to the case of Mr. Capps should operate to establish a new *grade* in your department

¹ Printed immediately after this opinion.

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and thus create a vacancy in the *grade* of naval constructor held by that officer while chief of bureau.

Since, as I have previously held, the office of chief of bureau, with the rank, title, and emoluments accompanying it, was not a grade prior to the time when the incumbent became eligible to retirement after 30 years' service, notwithstanding the appointment thereto was by the President with the advice and consent of the Senate, it would seem necessarily to follow that the mere issuance of another commission "in accordance with the rank and title" theretofore conferred and the making permanent of such theretofore temporary rank, title, and emoluments would not have that effect.

To hold otherwise and say that the issuance of the new commission created a vacancy in the grade of naval constructor would operate to increase to that extent the naval establishment; although there is no indication of such an intention on the part of Congress in the language of the statute. It is a well-settled rule that "a statute should not be construed as making an appropriation, or authorizing the expenditure of money unless the language is sufficiently explicit to clearly justify it" (18 Op. 174, 176); and, as you say in your letter, "when Congress has seen fit to make increases in the numbers of officers in the Navy, either generally or in particular corps or grades, it has generally used specific and apt language to accomplish that object." Besides, it will be observed from the statutes above quoted that in legislating with respect to naval constructors Congress has been very careful to limit their number.

It seems clear therefore that Congress did not intend by the act of 1910 to increase the number of officers in the Navy, and that the sole purpose of the act was to make permanent the rank, title, and emoluments of an officer serving as chief of bureau who had become eligible for retirement by reason of age or length of service, but who preferred to remain upon the active list. For these reasons I answer both your questions in the negative.

Respectively,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE NAVY.

NAVAL OFFICERS SERVING AS BUREAU CHIEFS—RANK
AND EMOLUMENTS.

A naval officer who has served as chief of bureau in the Navy and has returned to general duty before the expiration of 30 years' service, is not entitled, upon becoming eligible for retirement, to the same rank and emoluments to which he would have been entitled under the provisions of the naval appropriation act of June 24, 1910 (36 Stat. 607,608), if he had become eligible for retirement while still acting as chief of bureau.

The words "Any officer of the Navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired," found in the third paragraph of the act of May 13, 1908 (35 Stat. 128), refer to the case of retirement during service as chief of bureau.

DEPARTMENT OF JUSTICE,

July 9, 1910.

SIR: I reply to a communication from Commander Philip Andrews dated on board the *Dolphin* at Gloucester, Mass., July 4, 1910, in which he says that he writes by your direction and that you desire an informal expression of opinion on the question whether an officer who has served as a chief of bureau in the Navy but resigns or is removed from that position "before the expiration of a total of 30 years' service" may be retired when, after an interval of return from the chiefship of a bureau to general duty he becomes eligible for retirement, with the same rank and emoluments as if he had been retired or had become eligible for retirement while still acting as chief of bureau. This question arises under the third paragraph of the act approved May 13, 1908 (35 Stat. 127, 128), and the paragraph of the act of June 24, 1910, entitled "An act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eleven, and for other purposes," which reads as follows:

"The pay and allowances of chiefs of bureaus of the Navy Department shall be the highest shore-duty pay and allowances of the rear admiral of the lower nine; and all officers of the navy who are now serving or shall hereafter serve as chief of bureau in the Navy Department and are eligible for retirement after 30 years' service, shall have, while on the active list, the rank, title, and emoluments of a

NOTE.—This opinion is referred to on p. 529, and therefore, although rendered informally is included herein.

chief of bureau, in the same manner as is already provided by statute law for such officers upon retirement by reason of age or length of service, and such officers, after 30 years' service, shall be entitled to and shall receive new commissions in accordance with the rank and title hereby conferred." (36 Stat. 607-608.)

It will make the matter plainer to quote at the outset these pertinent provisions of the act of May 13, 1908:

"Provided further, That the pay and allowances of chiefs of bureaus in the Navy Department shall be the highest pay of the grade to which they belong, and not below that of rear admiral of the lower nine. * * * When an officer of the Navy has been thirty years in the service, he may, upon his own application, in the discretion of the President, be retired from active service and placed upon the retired list with three-fourths of the highest pay of his grade: *And provided further,* That any officer of the Navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired, shall be retired with the rank, pay and allowances authorized by law for the retirement of such bureau chief." (35 Stat. 128.)

It is obvious under the language last quoted that an officer actually retired from active service while still acting as chief of bureau became entitled, before the new enactment of 1910, to pay during retirement of not less than three-fourths of the pay of a "rear admiral of the lower nine"; but this privilege did not extend to officers who became "eligible for retirement," as the new statute of 1910 says, without being actually retired; and the purpose of the new enactment of 1910 quite clearly was to extend to chiefs of bureau becoming eligible for retirement the same privileges as under the prior law they could claim upon actual retirement. This extension of the old rule to chiefs of bureaus becoming eligible for retirement, without actual retirement, affords an adequate motive for and explanation of the new legislation; and it serves at once to show that the enactment of 1910 had a rational and important purpose without its being deemed to have enlarged the prior rule in other important features.

I come, then, to your exact inquiry, and I think that it must be answered in the negative. Several things so indicate. In the first place, it is clear that under the act of 1908 an officer who ceased to be a chief of bureau and returned to general service before actual retirement could receive hereafter for his general service only the proper pay of his regular rank, without increase on account of his having formerly been chief of bureau. There is nothing in the legislation before 1910 to give any officer returning to active general service larger pay thereafter because he had previously been a chief of bureau. This being so, how can it be considered that under the statute as it stood before 1910 such officer returning to active general service from a previous headship of a bureau should receive larger pay because of that former service as chief of bureau upon his being actually retired? It is plainly unreasonable to think that the previous service as chief of bureau should enlarge pay in retirement when it would not enlarge pay in active service immediately preceding the retirement. I therefore consider it clear that the words of the old statute underlined in the following clause—"any officer of the Navy who is now serving or shall hereafter serve as chief of bureau in the Navy Department, *and shall subsequently be retired*"—refer to the case of retirement during service as chief of bureau. In the next place, as I have already said, there is nothing in the act of 1910 to alter this rule. It is a rule so reasonable that pretty clear language would be needed for its alteration; especially as it may be taken as a proper general rule that grants of exceptional privileges in retirement be required to be more than indefinite and dubious. The very language of the act of 1910, however, corroborates my interpretation of the former law; for the language now is concerning "all officers of the Navy who are now serving or shall hereafter serve as chief of bureau in the Navy Department, and *are* eligible for retirement," etc. The wording is no longer concerning officers "subsequently" retired or eligible for retirement, and it is no longer in the future tense at all. On the contrary, the words "are eligible for retirement" must be taken to refer to a present eligibility for retirement, occurring while the service as

534 *Eight-hour Law—Contract for Furnishing Caissons.*

chief of bureau continues. In the third place, the argument founded upon an interval of ordinary pay in case of active service between the chiefship of a bureau and the arrival of actual retirement is equally applicable to the statute of 1910. It can not be believed that it was the intention of the new legislation to give an officer who once had been chief of bureau higher pay upon his becoming eligible for retirement than the same officer could have while in active general service between his service as chief of bureau and his becoming eligible for retirement. Finally, I am informed that officers of relatively short service and relatively low rank are competent for service as chief of bureau; and a construction of the acts of 1908 and 1910 otherwise than as I now interpret them would advance all these officers upon their actual retirement or their becoming eligible for retirement—however long after they had ceased to serve as chief of bureau—to a pay in retirement based upon the pay of a rear admiral of the lower nine. Such a result certainly can not be accepted without clear manifestation of a congressional purpose so to enact.

Respectfully,

LLOYD W. BOWERS,
Acting Attorney General.

THE SECRETARY OF THE NAVY.

EIGHT-HOUR LAW—CONTRACT FOR FURNISHING CAISSONS
FOR THE GOVERNMENT—ATTORNEY GENERAL.

The Attorney General is not authorized to express an official opinion as to whether the provisions of the eight-hour law of August 1, 1892 (27 Stat. 340), will apply to the construction of caissons for the United States, where the information is desired for the guidance of certain prospective bidders, as the question is not one which the Secretary of the Navy is called upon to decide in the administration of his Department.

DEPARTMENT OF JUSTICE,
December 14, 1910.

SIR: I have the honor to acknowledge the receipt of your letter of this date, stating that the Department of the Navy had invited bids for the furnishing of three steel caissons. You say: "The specifications for these caissons,

which will form a part of such contract or contracts as may be let for the furnishing of them, contemplate that they shall be built by the contractor and delivered to the Government complete and in working order, at the station or yards for which they are respectively designed; that periodical payments shall be made on account of the contract or contracts as the work progresses, but that the caissons shall be accepted by the Government only after they shall have been delivered and satisfactorily passed the specified tests."

You then inform me that "inquiry has been made by prospective bidders as to whether in the construction of these caissons the provisions of the eight-hour law of August 1, 1892 (27 Stat. 340) will apply," and you request my opinion upon that question, if I deem it appropriate to give it.

A similar case was presented to one of my predecessors, Mr. Attorney General Miller. A contract had been made by the Government with the Vermont Marble Company to furnish the material and partially erect a post-office building at Worcester, Mass. The company having requested the Secretary of the Treasury to advise them whether the laborers and mechanics engaged at the quarries, mills, and shops of the company, in getting out the materials to be supplied by them come within the application of the eight-hour law of August, 1892, the Secretary submitted the matter to the Attorney General. Mr. Miller declined to give the opinion asked for. He said:

"It will be observed that the duty prescribed in the first section (of the act), and the penalty imposed in the second, is confined to those persons, whether officers or agents of the Government or of the District, or contractors or subcontractors, whose duty it is to employ, direct, or control the services of such laborers or mechanics. The Secretary of the Treasury has no such relations to any of the workmen to be employed on this job, whether at the quarries or at the building itself. The duty to employ, direct, or control such laborers or mechanics, and the penalty for their wrongful employment, is with the contractor, and not with the Government or any of its officers or agents.

"Under the circumstances, it is clear that the question propounded by the marble company to the Secretary of the Treasury is one which the latter is not called upon to answer, and hence it is not, within the language of section 356 of the Revised Statutes, 'a question of law arising in the administration of his department.' It is therefore not a question upon which I am authorized to give an opinion."

Mr. Attorney General Miller then adds:

"It is, of course, quite needless that a citation shall be made of the very numerous opinions of my predecessors, as well as of myself, upon this point. The rule is as sound in reason as it is well supported by authority." (20 Op. 500, 501.)

In the "General provisions" accompanying specifications for contracts, and which are made part of the specifications for those contracts, "special attention is called to the provisions of the United States laws relating to hours of labor upon public works."

No other provision concerning the eight-hour law is in the specifications for the contracts submitted to me. By statute this must be embraced in some other contracts. By the act of June 24, 1910, second session Sixty-first Congress (36 Stat. 628), providing for the building of vessels of war, it is enacted:

"And the contract for the construction of said vessels shall contain a provision requiring said vessels to be built in accordance with the provisions of 'An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia,' approved August first, eighteen hundred and ninety-two."

The applicability of the eight-hour law of 1892 to the work done under contracts entered into by the Secretary of the Treasury for the Government is not a matter for his decision. Therefore it is not within the authority of the Attorney General to advise with regard to it.

This rule was considered in other cases by Mr. Attorney General Miller, and citations given to opinions of his

predecessors. (See 20 Op. 463; ib. 465.) In the latter case, the Attorney General said:

"As shown in the opinions above referred to, and the citations therein made, it is neither my duty, nor have I a right, to give an official opinion with a view to the guidance of persons who may propose to enter into contract relations with the United States."

Following these precedents, and agreeing with the soundness of the views expressed, I find myself unable to comply with the request contained in your letter.

Very respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

COMMON CARRIERS—TRANSPORTATION OF LETTERS AND
PACKETS OUTSIDE THE MAIL.

Where a State, by valid and lawful authority, requires a common carrier to furnish reports relative to its traffic, the fulfillment of the duty thus imposed constitutes a part of the current business of the carrier, and these reports may be carried outside the mail without payment of postage, consistently with the provisions of Section 184 of the Criminal Code.

The different companies of an association of railroads, which is without corporate or legal existence, formed for the purpose of weighing all carload shipments moving over the lines of the railroads that are members of the association, should be treated as separate organizations in their relation to the mail service, and their right to send letters without payment of postage is not extended by Section 184 of the Criminal Code.

Congress did not mean to do more than to permit carriers themselves, and particularly corporate carriers, to carry their own messages, which necessarily would be limited to their own business.

Syntax and grammar must yield to the intention of Congress.

Companies which are distinct corporations, but have been merged into one system of railways, are limited in their right to carry letters outside the mail without payment of postage to the distinct corporations composing the system. Thus, one such company may carry its own letters addressed to another company, to the point of connection and deliver them, and the second company may carry them to any point on its lines, but the latter could not act as an intervening company and carry and deliver letters written by the first company to a third company although the latter belonged to the same system.

By Section 184 of the Criminal Code Congress intended to adopt rather than set aside the opinion of Attorney-General Harmon. (21 Op. 394.)

"Current business" is presumably any business of the carrier when it comes up in such a way as to call for current communication.

DEPARTMENT OF JUSTICE,
December 20, 1910.

I have the honor to reply to your letter of August 1, 1910, supplemented by your letter of August 16, 1910, in which you ask me certain questions on the subject of the right of carriers to transport letters and packets outside the mail.

All your questions involve the construction of section 184 of the Penal Code (act March 4, 1909, 35 Stat. 1124), which is as follows:

"SEC. 184. Whoever, being the owner, driver, conductor, master, or other person having charge of any stagecoach, railway car, steamboat, or conveyance of any kind which regularly performs trips at stated periods on any post route, or from any city, town, or place to any other city, town, or place between which the mail is regularly carried, and which shall carry, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such steamboat or other vessel, *to the current business of the carrier*, or to some article carried at the same time by the same stagecoach, railway car, or other vehicle, except as otherwise provided by law, shall be fined not more than fifty dollars."

I. Your first question is as follows:

"The laws of one of the States require the collection, collation, and publishing, by a state bureau, of railroad and express shipments. The officials of that bureau propose to furnish the superintendent of an express company doing business as a common carrier within the State a supply of blank forms for use in reporting the information; the superintendent to distribute the forms to the several local agents of the company throughout the State, who are to fill them out and return the completed forms, through the superintendent, to the state bureau. The question to be determined is whether the return of these completed forms by the express company, through its own agencies, outside of the mails without the payment of postage, is permitted."

I am of opinion that the statute does permit the express company to carry these reports outside the mails without payment of postage for the reason that they "relate to the

current business of the carrier." When a State, by valid, lawful authority, requires a railroad company to make reports of its traffic, the fulfillment of the duty thus imposed is clearly a part of the "current business of the carrier" within the terms of the statute.

II. Your second question is as follows:

"The W association is an association of railroads having no corporate or distinct legal existence. The object of this association and the manner of conducting its business is that, by agreement of the railroads, a chairman of said association is selected, who, through employees chosen by him, some of whom are station agents of the various roads that are members of the association, weigh all carload shipments moving over the lines of the railroads that are members of the association. It has been the practice of this department to treat these associations as separate organizations in their relations to the mail service and to regard their right to send letters as limited like that of common carriers under the provisions of section 1142. Thus, an employee of the W association, whether joint or otherwise, can write and deliver to a railroad company letters intended for such company's officers or agents, but he can not transmit a letter addressed to another agent of the W association without the payment of postage, even though the railroad company over whose line it is forwarded has an interest in the subject of the correspondence to which it is not a party, because there would be the intervention of such company as a carrier. The question is now presented whether this right is extended by the new exception provided in the Criminal Code."

I am of opinion that the question should be answered in the negative, and that the modification of Revised Statutes, section 3985, made by section 184 of the new Penal Code, does not extend the right of free transportation of letters to cover such a case.

It may be that in any given case the letters referred to in your question would "relate to the current business of the carrier," but I am of opinion that even so they would not be excepted by the statute because they are not messages belonging to the carrier concerned.

This is apparent from the legislative history of the act.

Section 184 of the Penal Code is adapted from section 3985 of the Revised Statutes without any material change excepting the insertion of the phrase "to the current business of the carrier." Section 3985 of the Revised Statutes was construed by Attorney-General Harmon (21 Op. 394). He held, upon grounds which seem to me to be sound, that it was intended to deal only with transportation of communications between third parties, and to prohibit and make criminal only such transportation with the stated exceptions; and that it did not intend to prohibit or make criminal the transportation of communications, whatever their subject, belonging to the carrier itself. In the particular case of railroads or other corporation carriers his opinion necessarily had the effect of limiting the right of the carrier to the transportation of communications relating to the corporate business, because only such communications would be those of the corporation carrier itself as distinguished from its employees; but a noncorporate carrier could transport anything of his own that he wished.

Pursuant to this opinion your predecessor promulgated certain regulations (secs. 1141 and 1142, *Postal Laws and Regulations*, edition of 1902) which are set out in your letter, but which it is unnecessary to repeat here.

It appears that when this portion of the Penal Code came up in the Senate certain of the Senators dissented from the opinion of Attorney-General Harmon, and argued that under Revised Statutes, section 3985, it actually was made a crime for a railroad to carry a dispatch from one of its officers to another officer in connection with such an emergency as a wreck. Other Senators upheld the view of Attorney-General Harmon. After a considerable discussion, which appears in the *Congressional Record*, volume 42, pages 973, 974, 1901 to 1906, 1975, and 1976, it was decided to remove the question from dispute and to adopt formally the interpretation given by Attorney-General Harmon. This was done by inserting the clause above referred to. In the formal report presented to the House by its conference managers this purpose of the new clause "to the current business of the carrier" was explicitly stated as follows:

"The insertion of the words 'to the current business of the carrier' permits a common carrier to which a mail coach is attached to transmit by its servants to other stations on its route communications not inclosed in the mail, if such communications are confined to the carrier's business. This is in exact conformity with the construction placed upon existing law. The regulations of the Post-Office Department permit such communications, and these regulations have been declared legal by an opinion of the Attorney-General of the United States.

"The amendment therefore only makes clear the existing law upon the subject."

Similarly, Senator Sutherland, who moved the adoption of the clause in the Senate, stated in so moving:

"I move that amendment because I think it puts in express language precisely what the section means as it stands without it. * * * I think the opinion of the Attorney-General, to which I called attention yesterday, gives the correct construction to this section. * * * I think it should be clear under the law that the carrier should not have the right to carry mail intended for others, but only its own mail. To that extent I think the law should permit the carrier to go."

The amendment proposed by Senator Sutherland was thereupon agreed to. (Cong. Rec. vol. 42, p. 1976.) And also the debate on the floor plainly shows that the evil sought to be remedied by the amendment was the doubt as to the correctness of Attorney-General Harmon's opinion and the regulations of your department.

It thus appears that the purpose of Congress in introducing this clause was to permit a carrier to transport free outside the mails its own messages within the terms of the opinion of Attorney-General Harmon, and it was not the intention of Congress to revolutionize the then existing law and practice by permitting free transportation of letters and packets belonging to railroads or persons other than the carrier even though such letters or packets might "relate to the current business of the carrier." It is true that the grammatical syntax of the section is against this construction, for the letters and packets

referred to by the balance of the section, and permitted by its exceptions, are letters and packets belonging to persons other than the carrier, and mere technical grammar would require that the new exception should relate to the same subject; but such considerations of syntax and grammar must yield to the intention of Congress. (*Blake v. National Banks*, 23 Wall. 307; *U. S. v. Lacher*, 134 U. S. 624; *U. S. v. Healey*, 160 U. S. 136, 148; *Werckmeister v. Pierce Co.*, 63 Fed. 445, 454; *Griffith v. Bogert*, 18 How. 158.)

In my opinion the history which I have above outlined puts it beyond question that Congress did not mean to do more than to permit carriers themselves to carry their own messages, and particularly corporate carriers to carry *their own* messages, which would necessarily be limited to their business, as Attorney-General Harmon pointed out.

III. Your third question is as follows:

"The A, B, and C companies are distinct corporations, but have been merged into and are known as the C system of railways. The C corporation owns all or a large portion of the stock of the A and B companies and the control and management of the system are vested in one set of officers. Heretofore the practice of the department has been to regard the right to carry letters outside of the mails without payment of postage as being limited to the distinct corporations composing the system. For example, letters originating with the A company and addressed to the B company can be carried by the former and delivered to the latter company at a point of connection and can then be carried by the B company to any point on its line. The B company, however, can not carry letters written by the A company and addressed to the C company, as the B company would be an intervening carrier in this case. It is desired to know whether you consider this practice correct under existing law."

For the same reasons which I have outlined in answer to your second question I am of opinion that the existing practice of your department in respect to this situation is correct under the existing law.

IV. Your remaining question is a general question as to whether the change in the statute has changed the scope of the exceptions included therein as defined in the opinion of Attorney-General Harmon.

This question also is substantially answered by the answer to the preceding questions. It is true that Congress used the words "current business" instead of the word "business," which was used by Attorney-General Harmon in his opinion with reference to corporate carriers; but the history of the act, as I have stated, shows that the intention was not to set aside the opinion of Attorney-General Harmon, but rather to adopt it. Practically I think the precise definition of the words "current business" is not necessary, and in advance of specific cases it would be impossible. Presumably any business of the carrier is current when it comes up in such a way as to call for current communication.

Respectfully,

GEORGE W. WICKERSHAM.

The POSTMASTER GENERAL.

REVENUE-CUTTER SERVICE—INTERMENT OF OFFICERS
AND SEAMEN IN NATIONAL CEMETERIES.

Commissioned and warrant officers and seamen of the Revenue-Cutter Service who die in the ordinary administration of that service in time of peace are not entitled to the privilege of interment in national cemeteries.

DEPARTMENT OF JUSTICE,
December 28, 1910.

SIR: I have the honor to reply to your letter of the 1st instant, requesting my opinion upon the question whether, in the ordinary administration of the Revenue-Cutter Service in time of peace, commissioned and warrant officers and seamen of that service are entitled to the privilege of interment in national cemeteries.

The first legislation in respect to national cemeteries appears in section 18 of the act of July 17, 1862 (12 Stat. 594, 596), which authorized the President, whenever he deemed

it expedient. to "purchase cemetery grounds, and cause them to be securely enclosed, to be used as a national cemetery for the *soldiers* who shall die in the service of the country."

Following this, section 1 of the naval appropriation act of May 21, 1864 (13 Stat. 80, 85), provided "for the purchase and preparation of a site for a cemetery for the *Navy* and *Marine Corps*."

February 22, 1867 (14 Stat. 399), an act was approved entitled "An act to establish and to protect national cemeteries," the first section of which provided:

"That in the arrangement of the national cemeteries established for the burial of deceased *soldiers* and *sailors*, the Secretary of War is hereby directed to have the same inclosed with a good and substantial stone or iron fence; and to cause each grave to be marked with a small headstone, or block, with the number of the grave inscribed thereon, corresponding with the number opposite to the name of the party, in a register of burials to be kept at each cemetery and at the office of the quartermaster-general, *which shall set forth the name, rank, company, regiment, and date of death of the officer or soldier*; or, if unknown, it shall be so recorded."

This act was amended on June 1, 1872 (17 Stat. 202), by adding thereto the following:

"That from and after the passage of this act all *soldiers* and *sailors* honorably discharged from the service of the United States who may die in a destitute condition, shall be allowed burial in the national cemeteries of the United States."

March 3, 1873 (17 Stat. 605), an act was approved entitled "An act to authorize the interment of honorably discharged *soldiers*, *sailors*, and *marines* in the national cemeteries of the United States," which provided:

"That honorably discharged *soldiers* *sailors* or *marines* who served during the late war either in the regular or volunteer forces, dying subsequent to the passage of this act may be buried in any national cemetery of the United States free of cost and their graves shall receive the same care and attention as the graves of those already buried.

The production of the honorable discharge of the deceased shall be authority for the superintendent of the cemetery to permit the interment."

The foregoing statutes were codified in section 4878 of the Revised Statutes, which provides:

"SEC. 4878. All soldiers, sailors, or marines, dying in the service of the United States, or dying in a destitute condition, after having been honorably discharged from the service, or who served during the late war, either in the regular or volunteer forces, may be buried in any national cemetery free of cost. The production of the honorable discharge of a deceased man shall be sufficient authority for the superintendent of any cemetery to permit the interment."

This section was amended by an act approved March 3, 1897 (29 Stat. 625), so as to authorize the burial of army nurses in such cemeteries.

The history of section 4878, Revised Statutes, makes it clear that the words "soldiers, sailors, or marines," as used therein, had reference to persons in the Army, the Navy, or the Marine Corps. It is also clear that the Revenue-Cutter Service, neither in its inception nor in its more recent development, is to be regarded as a part of the Navy, to which it would naturally be assigned, unless it is cooperating therewith in accordance with the express provisions of law on the subject.

The Revenue-Cutter Service was first authorized by the act of March 2, 1799 (1 Stat. 627, 699), entitled "An act to regulate the collection of duties on imports and tonnage," which empowered the President, "for the better securing the collection of the duties imposed on" imports and tonnage, "to cause to be built and equipped so many revenue cutters not exceeding ten, as may be necessary to be employed for the protection of the revenue," the expense thereof to be paid out of the revenues on imports and tonnage. (Sec. 97.) That act further provided that there "shall be to each of the said revenue cutters, one captain or master, and not more than three lieutenants or mates, first, second, and third, and not more than seventy men,

including noncommissioned officers," the Secretary of the Treasury being authorized to contract for the supply of rations for the officers and men of said revenue cutters. (Sec. 98.) The latter section contained a proviso that "the said revenue cutters shall, whenever the President of the United States shall so direct, cooperate with the navy of the United States, during which time, they shall be under the direction of the Secretary of the Navy, and the expenses thereof shall be defrayed by the agents of the Navy Department."

The act of March 2, 1799, further provided "that the officers of the said revenue cutters shall be appointed by the President of the United States, and shall respectively be deemed officers of the customs, and shall be subject to the direction of such collectors of the revenue, or other officers thereof, as from time to time shall be designated for that purpose." The officers of the revenue cutters were further authorized to go on board ships or vessels arriving within the United States, or within four leagues of the coast thereof, if bound for the United States, and search and examine the same, etc., and to "execute and perform such other duties for the collection and security of the revenue, as from time to time shall be enjoined and directed by the Secretary of the Treasury, not contrary to law, and the provisions hereinbefore contained."

These and other provisions of the act of March 2, 1799, are preserved in Title XXXIV of the Revised Statutes, relating to the "Collection of duties."

Certain acts regulating the Revenue-Cutter Service were passed during the civil war period, which are also embraced in Title XXXIV of the Revised Statutes. Particular reference need only be made to the act of February 4, 1863 (12 Stat. 639), which provided that "the officers of the Revenue-Cutter Service, *when serving in accordance with law, as part of the Navy*, shall be entitled to relative rank, as follows: Captains, with and next after lieutenants commanding in the navy; first lieutenants, with and next after lieutenants in the navy; second lieutenants, with and next after masters in line in the Navy; third lieutenants, with and next after passed midshipmen in the navy." This

provision was preserved in section 1492 of the Revised Statutes.

The recent legislation with respect to the Revenue-Cutter Service does not purport to amalgamate it with the navy. (Act of April 12, 1902, 32 Stat. 100; act of May 26, 1906, 34 Stat. 200; act of April 16, 1908, 35 Stat. 61.)

By that legislation, commissioned officers in the Revenue-Cutter Service are given relative rank with certain officers in the Army and Navy, and "the same pay and allowances, except forage," as officers of corresponding rank in the Army (act of April 12, 1902, secs. 2, 3; act of April 16, 1908, sec. 1); officers are to be promoted and retired by means of a retiring board, convened by direction of the Secretary of the Treasury (act of April 12, 1902, secs. 5, 9); persons composing the enlisted force are required to be enlisted for a term not to exceed three years, in the discretion of the Secretary of the Treasury, who is required to "prepare regulations governing such enlistments and for the general government of the service" (act of May 26, 1906, sec. 1); provision is made for the organization of Revenue-Cutter Service courts, by the Secretary of the Treasury, for the purpose of punishing offenses against the discipline of the Revenue-Cutter Service "too grave in character to be adequately dealt with directly by the commanding officer" (*ib.*, sec. 3), and for the apprehension and arrest of deserters from the service, it being provided "that no person who has deserted from the Revenue-Cutter Service shall afterwards be employed in said service, or enlisted in any other military or naval service under the United States, unless," etc. (*Ib.*, sec. 5).

Despite the military character given the Revenue-Cutter Service by the legislation referred to, it is still an organization separate and distinct from the Navy, under the control of the Secretary of the Treasury and assigned to duty in connection with the collection of the customs revenue. Now, as formerly, it can only be regarded as part of the Navy when serving therewith in accordance with law. (Secs. 1492 and 2757, R. S.) The following proviso to section 2 of the act of April 12, 1902, apparently was inserted by Congress for the purpose of preventing any

misapprehension as to the relations of the Revenue-Cutter Service to the Navy arising from its action in conferring military rank and privileges upon the officers of that service:

“* * * *Provided further*, That no provision of this act shall be construed as giving any officer of the Revenue-Cutter Service military or other control at any time over any vessel, officer, or man of the naval service. Nor shall any naval officer exercise such military or other control over any vessel, officer, or man of the Revenue-Cutter Service, except by direction of the President.”

The view thus expressed is in line with the opinions of the Comptroller of the Treasury (8 Comp. Dec. 852; 15 ib., 807). In the latter case, considering the longevity pay of an officer of the Marine Corps who had served in the Revenue-Cutter Service, and referring to the act of February 24, 1881, which provided that “the actual time of service in the Army or Navy, or both,” should be allowed all officers in computing their pay, the comptroller said:

“The service, then, that entitles marine officers to credit in computing longevity pay is the time employed in the volunteer service, and service in the *Army* or *Navy*, or both. No other service can be credited in such computation.

“By the act of April 12, 1902 (32 Stat. 100), the pay and allowances of commissioned officers of the Revenue-Cutter Service were assimilated to those of officers of corresponding rank in the Army, but that law does not make service in that establishment of the Treasury Department ‘service in the Army.’ Service in the Revenue-Cutter Service is in no sense service in the Army or Navy.”

Furthermore, it appears from the legislation in question that Congress has carefully specified the instances in which officers of the Revenue-Cutter Service shall be entitled to the privileges of officers of the Army.

I therefore answer your question in the negative.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF WAR.

TEN-MILLION-POUND TESTING MACHINE—TRANSFER TO
BUREAU OF STANDARDS.

Certain equipment, among which is a ten-million-pound testing machine, which was purchased by the Department of the Interior for investigating structural materials, is the property of the United States, and, under existing law, can not be transferred to the Bureau of Mines, but should be transferred to the Bureau of Standards of the Department of Commerce and Labor in order that it may be applied to the specific purpose for which it was authorized.

Express statutory authority is not required for every administrative act.

DEPARTMENT OF JUSTICE,

January 5, 1911.

SIR: Under date of the 24th ultimo you wrote me as follows:

"A difference of opinion having arisen between the Department of Commerce and Labor and the Department of the Interior upon the question of the right of possession to certain equipment, among which is a 'ten-million-pound testing machine,' constructed by Tinius Olsen & Co., of Philadelphia, Pa., at a cost of \$32,400, I have to request an opinion whether, under existing law, this equipment is now the property of the Department of the Interior, and whether this department is at liberty to transfer it, or so much of the same as may be necessary, to the Bureau of Mines, for use in its investigations of structural and other materials used in mines, or in support of the roofs of mines, and in mine equipment."

This property, you say, was purchased by the Department of the Interior, under appropriations by Congress reading substantially as follows (33 Stat. 1187; 34 Stat. 728, 1335; 35 Stat. 349, 989):

"For the continuation of the investigation of the structural materials both belonging to and for the use of the United States, such as stone, clays, cement, and so forth, under the supervision of the Director of the United States Geological Survey, to be immediately available, * * *."

The Bureau of Mines was established in the Department of the Interior by the act of May 16, 1910 (36 Stat. 369).

Section 2 of that act provided:

"That it shall be the province and duty of said bureau and its director, under the direction of the Secretary of

the Interior, to make diligent investigation of the methods of mining, especially in relation to the safety of miners, and the appliances best adapted to prevent accidents, the possible improvement of conditions under which mining operations are carried on, the treatment of ores and other mineral substances, the use of explosives and electricity, the prevention of accidents, and other inquiries and technologic investigations pertinent to said industries, and from time to time make such public reports of the work, investigations, and information obtained as the Secretary of said department may direct, with the recommendations of such bureau."

Section 4 read:

"That the Secretary of the Interior is hereby authorized to transfer to the Bureau of Mines from the United States Geological Survey the supervision of the investigations of structural materials and the analyzing and testing of coals, lignites, and other mineral fuel substances and the investigation as to the causes of mine explosions; and the appropriations made for such investigations may be expended under the supervision of the Director of the Bureau of Mines in manner as if the same were so directed in the appropriations acts; and such investigations shall hereafter be within the province of the Bureau of Mines, and shall cease and determine under the organization of the United States Geological Survey; and such experts, employees, property and equipment as are now employed or used by the Geological Survey in connection with the subjects herewith transferred to the Bureau of Mines are directed to be transferred to said bureau."

The sundry civil act approved June 25, 1910 (36 Stat. 743), repealed so much of the Bureau of Mines act as transferred to said bureau the supervision of the investigations of structural materials and equipment therefor by the following provision:

"So much of the act establishing a Bureau of Mines, approved May sixteenth, nineteen hundred and ten, as transfers to said bureau the supervision of the investigations of structural materials and equipment therefor is repealed."

In a subsequent paragraph of that act (36 Stat. 765) an appropriation was made for continuing investigations of structural materials in the Bureau of Standards, which reads as follows:

"For the continuation of the investigation of the structural materials both belonging to and for the use of the United States, such as stone, clays, cement, and so forth, under the supervision of the Director of the Bureau of Standards, including necessary personal services, to be immediately available, fifty thousand dollars."

Referring to this legislation you say:

"There would seem to be no question, at least none is raised, of the authority of the Secretary of the Interior to purchase this equipment for the use of the Geological Survey. Section 4 of the act of May 16, 1910, specifically authorized and directed the transfer of this function to the Bureau of Mines. The act of June 25, 1910, *supra*, repeals so much of the last-named act as transferred to said bureau the supervision of the investigations of structural materials '*and equipment therefor.*' There is no provision in the act creating the Bureau of Standards, and nothing in subsequent legislation, specifically providing for the transfer of this equipment, so as aforesaid purchased by and for the use of the Interior Department, to the Department of Commerce and Labor, and the general question of authority of one department to transfer property purchased by it to another without specific statutory provision therefor is presented. The Department of Commerce and Labor contends that its Bureau of Standards has exclusive jurisdiction and control over matters relating to the testing of structural materials, and, as a consequence, that all of the government's equipment provided for investigations of such materials would go with the supervisory duty thus imposed. The Bureau of Mines, on the other hand, is specially charged with investigation 'of the methods of mining, especially in relation to the safety of miners, and the appliances best adapted to prevent accident, and the possible improvement of conditions under which mining operations are carried on.' A primary feature of mining methods, and one of the most important considerations in

preventing mine accidents and otherwise providing for the safety of miners, is the element of wall and overhead support, in which heavy structural material, both steel and wood, is used, and in the investigation thereof and testing for the purpose of ascertaining the availability of materials therefor, the use of machinery of the character here in question is essential."

If, as the legislation in question on its face rather indicates, it was the intention of Congress to devolve entirely upon the Bureau of Standards of the Department of Commerce and Labor the entire work of investigating structural materials, and to forbid the Bureau of Mines or the Geological Survey, in the Department of the Interior, from engaging in such work, I think there can be no doubt as to the right and duty of the Secretary of the Interior to transfer to the Bureau of Standards the equipment which Congress had previously authorized him to purchase for the purposes of such work while it was under his jurisdiction.

The equipment referred to is the property of the United States, and is in the custody of the Interior Department merely for the purpose of discharging the duties that had been imposed upon it. An absolute transfer of such duties to another department should therefore be held to carry with it the equipment necessary to the discharge of those duties, unless Congress has indicated a contrary intention. To hold otherwise would be to say that the functions of Government in this respect are to be suspended because of the mere failure of Congress to give express authority for the transfer of the equipment necessary to their discharge from one department to another. I am aware of no provision of law which imposes such a restraint upon executive action. Express statutory authority is not required for every administrative act (*United States v. Macdaniel*, 7 Pet. 1, 13, 14; 25 Op. 270; 28 *ib.* 124). Clearly, the equipment in question should not be held idle and useless in the Geological Survey when needed for the discharge of the duties imposed upon the Bureau of Standards. At the same time it could not properly be applied to uses other than that for which it was intended, especially when necessary for the performance of the duties for which it was specifically authorized.

But this case is complicated by the fact that it does not seem to have been the intention of the Congress to deprive the Bureau of Mines of all jurisdiction so far as the investigation of structural materials was concerned. An examination of the history of the legislation in question shows that it was understood in the House that the Bureau of Mines would still have power and authority to investigate structural materials so far as respects the particular subjects assigned to it. And it will be observed that the duty imposed upon the Bureau of Standards is only with reference to "structural materials both belonging to and for the use of the United States, *such as stone, clays, cement, and so forth.*"

When the provision with reference to the Bureau of Standards was under consideration in the House, the following occurred (Cong. Rec. Vol. 45, pp. 8650-8651):

"Mr. TAWNEY. Mr. Speaker, this matter was very thoroughly considered in the House when the sundry civil bill was recently under consideration. We spent practically two days in consideration of the question, both of jurisdiction and power, and appropriations for the Bureau of Mines. I do not intend to devote a great deal of attention to this question now, for the reason that at the conclusion of the debate the House, by an overwhelming majority, said, and properly so, that the testing of structural materials has no relation whatever to the function of a Bureau of Mines. I want to say to the gentleman from Pennsylvania [Mr. Dalzell] and to other friends of the Bureau of Mines that the action of the House, if it is adhered to, does not deprive the Bureau of Mines of the opportunity or the power or the money to make such structural material investigations as are incident or necessary to the construction or the operation of mines. Section 2 gives to the Bureau of Mines all the authority necessary to investigate structural materials that pertain to mines, and the appropriations that have been made for the Bureau of Mines are available for that purpose.

* * * * *

"Mr. TAWNEY. The language is very plain; and after a full discussion the House agreed and by a large majority declared that the investigation of structural material, such

as iron and steel, wood, glass, brick, clays, and cement, had no relation whatever to the functions of the Bureau of Mines, and that in appropriating money for that purpose by the Government to the Bureau of Mines we are simply duplicating the service. For these reasons the House heretofore declined to make a specific appropriation for the Bureau of Mines for this purpose.

* * * * *

"Mr. HOBSON. I wish to ask the chairman of the committee whether the provision for the Bureau of Mines as it now exists is ample to permit them to carry on such tests of materials that are a legitimate part of their duty?

"Mr. TAWNEY. I am obliged to the gentleman for asking me that question, because that reminds me of a statement made to me by the Secretary of the Interior within the last few days; that after an examination of section 2 he was satisfied that there was ample power and authority in that section to enable the Bureau of Mines to make all the tests of such structural materials in connection with all questions incident to the operations of mines as was necessary, and that the appropriation of \$310,000 was likewise ample for that purpose."

Mr. Smith, of Iowa, discussing the same matter, said (*ib.* 8654):

"* * * If the committee be sustained, then under the law the technological investigations of structural materials, so far as pertinent to mining, will be conducted under the mining bureau, and so far as not pertinent to mining will be conducted under the Bureau of Standards, and that is where it ought to be."

But while it may have been intended that the Bureau of Mines should still have devolved upon it the right and duty of investigating structural materials so far as pertained to the specific duties imposed upon it, it seems equally clear, from the same sources, that it was the intention of Congress that the equipment purchased by the Secretary of the Interior for the purpose of investigating "structural materials both belonging to and for the use of the United States, such as stone, clays, cement, and so forth, under the supervision of the Director of the United

States Geological Survey," should be transferred to the Bureau of Standards, because of the fact that the duty of continuing that particular work had been devolved upon that bureau and taken away from the Geological Survey and the Bureau of Mines.

In respect to the effect of the repeal of that part of the act creating the Bureau of Mines by which the work of investigating structural materials and the equipment therefor was transferred to it from the Geological Survey, the following debate occurred in the House (*ib.* 9088):

"Mr. TAWNEY. The provision is this: It is necessary in order to carry out what this House has three times voted to do, the last time by an overwhelming majority; that is, that the investigation of structural material, outside of the technologic investigation pertaining to mines, goes to the Bureau of Standards. Otherwise the equipment, of course, remains idle. There is no appropriation in the Bureau of Mines for its use. There is no appropriation in the Geological Survey by which it can be used, and the \$50,000 appropriated for the Bureau of Standards enables the Bureau of Standards to utilize the equipment and carry on the investigation of structural material where that equipment now is, just the same as in the technologic branch.

* * * * *

"Mr. MONDELL. I will ask the gentleman from Minnesota, Where does this amendment leave the machinery that was transferred from the technological branch of the Geological Survey?

"Mr. TAWNEY. It will be transferred to the Bureau of Standards. The personnel connected with that work which tested structural material, with its equipment, will also be transferred to the Bureau of Standards.

"Mr. MONDELL. This personnel and machinery was in the Geological Survey. It was authorized and allowed to be put in the Bureau of Mines. Do I understand that a simple repeal of the transfer transfers that material and personnel to another bureau?

"Mr. TAWNEY. That is the appropriation of \$50,000. It does, I may say, I am informed by the department.

"Mr. MONDELL. Are you not leaving it where it was, with the Geological Survey?

"Mr. TAWNEY. No; the Geological Survey will transfer the equipment to the Bureau of Standards.

"Mr. MONDELL. Do I understand that a mere appropriation can transfer material and personnel.

"Mr. TAWNEY. Well, the appropriation for this work in the Bureau of Standards is a repeal of that part of the Bureau of Mines law which transferred the equipment to the Bureau of Mines, together with any appropriation that the Bureau of Mines had for this specific purpose, and necessarily carries the equipment and personnel with the appropriation when it is made.

"Mr. MONDELL. I can not so understand it.

"Mr. TAWNEY. The department will take their chances on that. I will say that I consulted with the department in regard to that, and there seems to be no doubt about it. That has been done in other cases. There seems to be no doubt about the fact."

The legislation referred to expressly deprived the Secretary of the Interior of authority to transfer the equipment used in connection with the investigation of structural materials of the character named from the Geological Survey to the Bureau of Mines. There was no inhibition upon its transfer from the Geological Survey to the Bureau of Standards. On the contrary, the understanding seems to have been that it would be transferred to the Bureau of Standards. It follows, therefore, for the reasons above stated, that it is both the right and duty of the Secretary of the Interior to make the transfer.

This view is entirely consistent with the fact that it may not have been intended to deprive the Bureau of Mines of authority to investigate structural materials so far as pertains to the duties for which it was created. Those duties are separate and distinct from the purposes for which the purchase of the equipment referred to was authorized by Congress. As shown, such equipment was authorized for the express purpose of investigating structural materials of a certain character, which particular work has been taken from the Geological Survey and transferred to the Bureau of Standards.

I have therefore to advise you that the equipment to which you refer, including the 10,000,000 pound testing machine, is the property of the United States, and, under existing law, can not be transferred to the Bureau of Mines, but should be transferred to the Bureau of Standards of the Department of Commerce and Labor, in order that it may be applied to the specific purpose for which it was authorized. In saying this, I assume that there is an appropriation available to defray the expense of such transfer.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE INTERIOR.

COPYRIGHT LAW—REGISTRATION OF LITHOGRAPHS OF
WORKS OF ART LOCATED ABROAD.

The Register of Copyrights has authority to enter a claim in a painting which is made merely as a first step in the production of a lithograph as a "work of art" within the meaning of section 11 of the copyright law of March 4, 1909, (35 Stat. 1078), provided the painting itself is a work of art.

The Register of Copyrights has the authority to enter a claim to copyright in a published lithograph, not made within the United States, where the design, drawing, or painting, which forms the first step in the production of such lithograph, has been made for the purpose of being converted into a lithograph, and is located in a foreign country, provided the design, drawing or painting with reference to which the application is made is a work of art.

The meaning of the term "work of art" and its application to a particular design, drawing, or painting, etc., under section 11 of the act of March 4, 1909 (35 Stat. 1078), does not present a question of law, but one of fact, to be determined in each instance by the Register of Copyrights.

DEPARTMENT OF JUSTICE,

January 9, 1911.

SIR: I have the honor to acknowledge receipt of your communication of December 30, 1910, in which you, at the instance of the Register of Copyrights, submit to me the following statement of facts:

On September 17, 1910, J. Bauman submitted a number of applications for the entry of "paintings" under paragraph (g), section 5 of the act of March 4, 1909 (35 Stat.

1075, ch. 320), which relates to "Works of art; models or designs for works of art." The identifying copies deposited with these applications consisted of chromolithographs, all of which were in the nature of birthday, Christmas, or valentine cards, and bore the notice "Copyright 1910 by J. Bauman," apparently added with a stamp after the lithograph had been completed. On September 24, 1910, an additional number of applications, executed in the same form, and each accompanied by a chromolithograph as an identifying copy, of the same general nature as those first sent, except lacking the copyright notice, were received. In both cases the applicant was informed that the lithographs for which registration was sought were obviously intended for publication, and that, therefore, the proper procedure would be to register the copyright claims therein after publication under paragraph (k) of said act, which relates to "Prints and pictorial illustrations."

On October 3, 1910, eighteen additional applications for the entry of claims in similar lithographs were received from Mr. Bauman, with the request that they be entered in class (k), it being stated that they were lithographic prints produced in the United States; and they were registered and certificates of entry were sent to the applicant.

On December 12, 1910, a number of applications were received, each for the entry of a copyright claim of a "painting located in England," the identifying copy in each case consisting of the photograph of a picture showing the shape and size of the customary Christmas card, and the designs on the cards are of the usual kind, not differing in general style from those in the lithographs described above.

The Register of Copyrights further states that the circumstances strongly tend to show that the alleged "paintings" sought to be registered under date of December 12, 1910, are intended to be reproduced as chromolithographs and placed on the market as birthday cards and the like, and are not independent works of art, but the first necessary step in the production of the lithographs, and further, that the purpose of seeking their registration is to give support to a contention that such lithographs are not

required to be manufactured "by a process wholly performed within the limits of the United States," as provided in section 15 of the copyright act, because they fall within the provision excepting lithographs of subjects which are "located in a foreign country and illustrate a scientific work or reproduce a work of art."

And my opinion is requested upon the following questions:

1. Whether the Register of Copyrights has authority to enter a claim in a painting made merely as a first step in the production of a lithograph as a "work of art" within the meaning of section 11 of the copyright act?

2. Whether the Register of Copyrights has authority to enter a claim to copyright in a published lithograph, not made within the United States, where the design, drawing, or painting, which forms the first step in the production of such lithograph, has been made for the purpose of being converted into a lithograph, and is located in a foreign country?

My answer to these abstract questions may be found in an opinion transmitted to you for the guidance of the Register of Copyrights on January 27, 1910. (28 Op. 150, 157.) I there construed that provision of the manufacturing clause of the copyright act which excepts separate lithographs and photo-engravings "where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art;" and held that where the painting was properly classified as a work of art and was located in a foreign country, lithographs thereof fell within the exception. And, as to the probable effect of such holding, I said:

"It has been suggested that if it be held that lithographs and photo-engravings of all works of art located in a foreign country may be made abroad, the purpose of the law to protect American workmen might be evaded by carrying works of art from this country into a foreign country and there having them lithographed, and also by having paintings made in a foreign country for the purpose of lithographing. Whether or not Congress had such grounds of

objection in mind when this act was passed, does not appear from its language; and I am not now called upon to determine whether a painting carried from this country into a foreign country for the purpose of evading the spirit of the law and in fraud of the law would be considered as located in a foreign country in the sense of the statute; but there is certainly nothing in the act to indicate that Congress intended to make any distinction between works of art based upon the purposes for which they are created. If Congress had not intended to embrace in the exception paintings created in a foreign country for the purpose of lithographing or photo-engraving, it could easily have expressed such intent; and since it failed to do so by the use of any language from which such a restriction may be implied, it is not within the province of a judicial officer called upon to interpret this statute to read into the act a provision of such a vital character."

I think it quite likely that if the attention of Congress had been directed to the fact that the manufacturing clause of the act could be to a material extent evaded in the manner suggested, the phrase "a work of art," as used therein, would have been modified in such way as to prevent such evasion; but the effect is the same whether the omission was intentional or by oversight, as Congress alone has the power to so modify the language as to justify the construction which it is thought this exception should have in the interest of American labor.

However, the facts there under consideration were materially different from those here presented. There the original paintings had already been registered by the register of copyrights as "works of art," and I therefore said, "Since the paintings are located in a foreign country, these cards fall within the exception, provided the paintings are 'works of art'; and since they have been copyrighted as such, and possess artistic beauty, I know of no reason why they should not be so considered."

But it was not intended there to define the term "a work of art," or to decide whether the paintings in question fell within its meaning, as the paintings had already

been registered as works of art, and no such question was propounded to me, the real matter submitted being the construction of this clause of the manufacturing provision of the statute. Furthermore, the meaning of this expression, and its application to a particular work, does not present a question of law, but one of fact, and is not, therefore, one for decision by me. The phrase appears to be a new one in the copyright statutes, and experts would doubtless often differ as to its application; and the Register of Copyrights must, therefore, when application for registration is made, determine for himself the question whether the work presented is one of art, but in so doing he can not, of course, act arbitrarily and without good reason.

I therefore answer both questions propounded in the affirmative, provided the painting with reference to which the application is made is "a work of art;" but whether or not it is such a work is a question for the Register of Copyrights.

Very respectfully,

J. A. FOWLER,
Assistant Attorney-General.

Approved:

GEORGE W. WICKERSHAM.

THE PRESIDENT.

INTERNAL REVENUE—SPECIAL TAXES—FORM OF RECORD.

The record of special taxes which the collectors of internal revenue are required to make under section 3240 of the Revised Statutes, as amended by the act of June 21, 1906 (34 Stat. 387), should be in such form as to show clearly in each instance the business for which the special taxes are paid. The words should be written in full, not abbreviated.

DEPARTMENT OF JUSTICE,

January 16, 1911.

SIR: I have the honor to acknowledge the receipt of your letter of the 13th instant, referring to the question which has been raised by Representative Adamson, of Georgia, as to the duty of the Commissioner of Internal Revenue under

562 *Internal Revenue—Special Taxes—Form of Record.*

section 3240 of the Revised Statutes, as amended by the act of June 21, 1906, to keep the record referred to therein in such form as to show clearly the business for which the special taxes mentioned are paid.

Section 3240, as amended, provides (34 Stat., 386), the italicized clause being added by the amendment of June 21, 1906:

"SEC. 3240. Each collector of internal revenue shall, under regulations of the Commissioner of Internal Revenue, place and keep conspicuously in his office, for public inspection, an alphabetical list of the names of all persons who shall have paid special taxes within his district, and shall state thereon the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality he shall furnish a certified copy thereof, as of a public record, for which a fee of one dollar for each one hundred words or fraction thereof in the copy or copies so requested may be charged."

The record referred to in this section is what is known in the Internal-Revenue Service as Record No. 10. It is in the form of a blank book, each page of which is entitled "Record of Special Taxpayers and Registers, ——— District of ———." The pages are divided into columns with these headings: "Name," "Business," "Place," "From what time," "Amount of tax," "Date of payment or issue of certificate," "Serial No. of stamp," "Serial No. of certificate," "Remarks."

The complaint is made by a prosecuting officer of the State of Georgia, in a letter to Representative Adamson, that "neither the Record 10, nor the certificate shows what the stamp or tax was issued and paid for. The collector in his certificate says 'said business' and 'such business,' and the only explanation given either in Record 10 or the certificate furnished by said collector is 'R. L. D.;' and, being a lawyer yourself, you can readily see without more a jury would be at a loss to know what 'R. L. D.' meant, if such certificate were used in prosecuting the holder of such stamp for a violation of the state prohibition law."

Referring to this record, the Commissioner of Internal Revenue, in a letter to Representative Adamson dated the 6th instant, states:

"From the earliest times the use of initials, as R. L. D., for retail liquor dealer; W. L. D., for wholesale liquor dealer; R. M. L. D., for retail malt liquor dealer, etc., has been sanctioned by this office, and no sufficient reason is seen to vary from the practice of using such abbreviations instead of writing out the names in full. In furnishing a copy of the record the collector of course should furnish an exact copy, and this office fails to see that it is incumbent on him to explain the meaning of the abbreviations used, which have a recognized meaning in the Internal-Revenue Service."

In my judgment it is the duty of the Commissioner of Internal Revenue, in order to carry out the evident purpose of Congress in amending section 3240 of the Revised Statutes so as to require collectors of internal revenue to furnish state prosecuting officers a certified copy of the record therein referred to, to keep the record in such form as will readily subserve the purposes of a criminal prosecution. In fact, I do not think the use of the abbreviations "R. L. D." and "W. L. D.," etc., was ever a sufficient compliance with the original section 3240. While those abbreviations may have a recognized meaning in the Internal-Revenue Service, the record directed to be kept by that statute is "for public inspection," and it would seem that it ought to be kept so that the public can understand it.

It will be observed that, in order to comply with this view of the law, no change in printed Form No. 10 will be required, merely a direction to the collectors to spell out the words "retail liquor dealer," "wholesale liquor dealer," etc., in making out that form.

The papers accompanying your letter are herewith returned.

Respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

PANAMA RAILROAD—TARIFF RATES.

In view of the concession contracts between the Panama Railroad Co. and the Republic of Colombia whereby "Colombian products" were to be transported at one-half the established freight rates, and the order of the Chairman of the Isthmian Canal Commission dated October 25, 1906, extending the reduced rates to Panamanian products "both of the soil and manufacture," and in view of the construction placed upon the order of the commission by the railroad company, that the provision applies, as to manufactured products, only to such as are made from natural products produced entirely in Panama: *Recommended*, That the order of the commission be restricted to the meaning placed upon it by the railroad company.

DEPARTMENT OF JUSTICE,
January 19, 1911.

SIR: By your letter of 9th instant, you request an opinion from me as to whether or not, under the concession hereinafter referred to, manufactured products originating within the Republic of Panama and transported over the Panama Railroad are entitled to a drawback of one-half the regular freight tariff rates for transportation on said railroad when the raw material from which such products are manufactured has been imported into Panama from other countries; and if so, whether such drawback should cover only the cost of manufacture, or also the value of the raw materials.

The following are verbatim extracts from the English version of the contracts entered into between the Republic of Colombia and the Panama Railroad Co., made effective by decrees of the Colombian Congress, under which the Panama Railroad Co. operates its line:

"Contract between Colombia and the Panama R. R. Co., July 5, 1867:

"ARTICLE XX. Colombian *productions* shall be transported by the railroad during the first *twenty years* of this contract, paying only *one-half* the rates of freight or transportation previously fixed by the company for foreign products of the same class; but this term being concluded, they shall continue to pay only a duty or freight *one-*

third less than that fixed by the said tariff.' (Bristow's report, p. 315.)"

"Decree of Colombian Congress of August ———, 1867, approving, with modifications, the contract of July 5, 1867:

"Article I. * * *

"6th. Article twentieth, thus:

"Article XX. Colombian productions shall be transported by the railroad during the first twenty years of this contract, paying only one-half the rates of freight or transportation previously fixed by the company for foreign products of the same class, but this term being concluded they shall pay a charge or freight not exceeding two-thirds of that previously fixed in the tariff of the company—tariff rates which the company can not increase in future in regard to Colombian productions.'" (Bristow's Report, pp. 321, 331.)

"Article 5 of contract of 1876:

"In order that Colombian *products* may be transported by the railroad under the conditions of Article XX of the same contract, there must precede a declaration of the shipper, duly attested by a bill of lading of shipment, with a certificate of the administrator of the national treasury at the port of shipment or other similar document, at the time of offering them, that such products are really Colombian; a necessary condition, without which there shall be no ground for any claim.' (Bristow's Report, p. 331.)

"Amendments of August 18, 1891.

"Article I:

"Article XX of the contract of July 5, 1867, approved by law No. 46 of the same year, shall read as follows:

"From and after July 1st, 1892, Colombian products passing over the Panama Railroad shall pay only *half* of the rate of freight established by the company for foreign products of the same class.'" (Bristow's Report, p. 335.)"

Upon the separation of Panama from Colombia and the establishment and recognition of the Republic of Panama, that country became the successor of and stood in the place

of Colombia as to this agreement, and the products of Panama became the subject of article 20 of that agreement, instead of those of Colombia. From the papers submitted to me it would appear that until October 25, 1906, this provision of the contract was interpreted by both parties as applying only to products of the soil, as well as of the mines and waters of Panama, when the same were offered for shipment in their natural and unmanufactured state, thus giving to the contract an interpretation which continued during a period of almost thirty years would seem to conclude both the parties to it. However, in June, 1906, a question seems to have been raised as to whether or not this interpretation was correct, and certain consideration was given to it, resulting in an order by the Chairman of the Isthmian Canal Commission, dated October 25, 1906, extending the reduced rates to Panamanian products, "both of the soil and manufactured." A memorandum of Captain Boggs, transmitted with your letter, states:

"This order has been considered by the Panama Railroad Company as applying to manufactured products produced entirely in the Republic of Panama, but several manufacturing concerns have since started operations on the Isthmus, and the company is now receiving claims for 'drawbacks' on shipments of manufactured tobacco, bread, macaroni, liquors, etc., made on the Isthmus, *but from products imported into Panama from other countries*, and the question now arises as to whether these claims should be allowed on these articles."

The presentation of this question shows the unfortunate effect of giving to words which had, by the uniform construction of many years, acquired a settled meaning, a new and broader construction, and as it does not appear that the order of October 25, 1906, was based upon any application made by the Government of the Republic of Panama or that the Isthmian Canal Commission has in any way committed itself with that Government, I would strongly recommend that the order be restricted to the meaning placed upon it by the action of the railroad company since

its date, namely, "as applying to manufactured products produced entirely in the Republic of Panama," by which I understand is meant articles manufactured in the Republic of Panama from natural products produced in the Republic.

It would appear to me not to be a question of strict statutory construction, but a question of the construction which you deem it expedient to place upon the order issued by the chairman of the commission, based upon a broader view of the meaning of the concession contracts than had obtained during a long period of years.

Aside from this view, I have not the Spanish originals of the contracts before me, and in the absence of them I assume that, being made between a private railroad corporation and the Government of the Republic of Colombia, the interpretation of the original language used in the contracts would govern, and it is possible that the words translated in the English version as "Colombian productions" may have a more restricted meaning than was sought to be given to the English equivalent by the order of October, 1906.

I therefore refrain from expressing an opinion on the question of the exact construction of the contracts, and return the papers to you in order that you may, if you shall be so advised, act in accordance with the suggestion above made. If, on the other hand, you still wish an opinion upon the contracts considered as an original proposition, I should be happy to take it up if you will furnish me with copies of the Spanish originals of the contracts in question.

Respectfully, yours,

GEORGE W. WICKERSHAM.

THE SECRETARY OF WAR.

EMPLOYMENT OF MR. HILL AS ATTORNEY FOR CHOCTAW NATION.

The firm of McCurtain & Hill having been employed by contract as counsel to represent the Choctaw Nation for a period of five years, and Mr. McCurtain having become principal chief of the Choctaw Nation by appointment from the President before the expiration of that period, Mr. Hill, the remaining member of the firm, can not continue to act as counsel for the tribe without a new contract, which contract must be approved by Congress.

DEPARTMENT OF JUSTICE,
January 19, 1911.

SIR: I have considered the subject of your letter of January 12, 1911, in which you ask my opinion concerning the employment of Mr. Hill, the surviving member of the firm of McCurtain & Hill, as attorney for the Choctaw Nation in place of his late firm.

You present three specific questions:

First. The firm of McCurtain & Hill, of McAlester, Okla., were employed by contract dated August 31, 1907, as counsel to represent the Choctaw Nation for a period of five years. Mr. McCurtain, the senior member of said firm, has recently become principal chief of the Choctaw Nation by appointment from the President of the United States. There arises the question whether the remaining member of the firm, Mr. Hill, can continue to act as counsel without further contract.

I am of opinion that he can not. The contract being one for personal services in which the services of Mr. McCurtain were contemplated as a part of the consideration, Mr. Hill could not alone claim the rights which the contract gave to him and Mr. McCurtain together without further action on behalf of the tribe. That right can be acquired by Mr. Hill only through further action on behalf of the tribe.

Justice v. Lairy, 19 Ind. App. 272 (49 N. E. 459) is exactly in point.

Other authorities to the same effect are:

Wheaton v. Cadillac Automobile Co. 143 Mich. 21 (106 N. W. 399).

Tasker v. Shepherd, 6 H. & N. 575.

Earl Cholmondeley v. Lord Clinton, 19 Ves. 261, 275.

McGill v. McGill, 2 Metc. (Ky.) 258, 260.

Roberts v. Kelsey, 38 Mich. 602.

Holmes v. Caldwell, 8 Rich. Law (S. C.) 247.

Landa v. Shook, 87 Tex. 608.

Fulton v. Thompson, 18 Tex. 278.

Smith v. Hill, 13 Ark. 173.

Weeks on Attorneys at Law, pages 500, 396.

Ewell's Lindley on Partnership (2d Am. ed.), pages 438, 439, 669, 670, 287, 288.

Burdick on Partnership, 167, 238.

The necessity of a new contract is emphasized in this particular case by the fact that the compensation proposed to be given to Mr. Hill is to be \$5,000, instead of the \$8,000 which under the former contract was paid to the firm.

The second question is whether the proposed supplemental contract for the employment of Mr. Hill as counsel can validly be made without action by Congress. This involves the construction of the following provision of the act of June 25, 1910 (36 Stat. 774, 808):

"That no contract or contracts heretofore or hereafter made affecting the tribal money and property of the said Indian tribes or nations (Choctaw and Chickasaw Nations) shall be approved until further action by Congress."

I am of opinion that the proposed contract does fall within the prohibition of the act. It "affects the tribal money and property," because the payment of \$5,000 a year is to be made out of the tribal fund and not out of the individual or allotted property of the Indians, and also because the services to be rendered include a representation of the property rights of the nation before administrative and legal tribunals. This is illustrated by the recital in bill No. 6 of the Choctaw council of November 30, 1908, which is incorporated into the proposed supplemental contract, and which said:

"The large property interests of the Choctaw Nation or tribe of Indians demand the entire time of our attorneys."

It is again illustrated by the statement of Senator Gore in his letter to the Attorney-General, which was made a part of the congressional records on the day of and prior

to the passage of the bill (45 Cong. Rec., pt. 8, p. 9064), where he said:

"It is not only the duty of these officials to safeguard and defend the rights of the Indians, but it is also the duty of Messrs. McCurtain & Hill, their regular attorneys."

In this connection he goes on to say that he referred to the bill which he had introduced concerning "contracts affecting tribal money and property."

I think, however, that any doubt whether the words "affecting the tribal money and property" are applicable to contracts for the services of attorneys is removed by the legislative history of the clause. The controversy out of which the provision grew was a controversy over this type of contract, and the evident object of Congress was to prohibit the further employment of attorneys for the Choctaw and Chickasaw Nations until some definite method for ratifying such employment should have been established by "further action by Congress." This is stated by Senator Gore in his letter dated April 14, 1910, addressed to the Attorney-General and made a part of the Congressional Record in connection with this general subject (45 Cong. Rec., pt. 8, p. 9064), which is as follows:

"To the Honorable ATTORNEY-GENERAL,

Washington, D. C.

"MY DEAR SIR: I am pleased to acknowledge receipt of your valued favor of the 11th instant, respecting the contracts between Mr. McMurray and certain members of the Choctaw and Chickasaw tribes of Indians. I beg to advise you that Senate bill 8093 passed the Senate on yesterday. This bill provides that all contracts affecting the tribal money and property of the Five Civilized Tribes must receive the approval of Congress before they shall become valid and binding. If this measure becomes a law, it will protect the Choctaws and Chickasaws against all contracts of a character similar to the McMurray agreements. Permit me to express the hope that no action will be taken upon the McMurray contracts pending this legislation in Congress.

"Most respectfully,

T. P. GORE."

The original Senate provision was substantially the same as the final provision which eventually became law. This was opposed by the House, and a conference having resulted, the provision emerged so changed as to require only the approval of the Secretary of the Interior and the President.

Senator Gore opposed this report in the Senate, and in speaking on the subject said:

"My purpose was to prevent and forever forestall what are known as the McMurray contracts." (*Ib.* 8879.)

Nevertheless, the Senate agreed to the report.

Mr. Tawney, speaking in the House for the conference report, said that the reason for the change by the conferees and the objections to the original Senate proposal were as follows:

"The amendment that was inserted in the Senate was objected to by the House conferees * * * upon the ground that it would be absolutely impracticable in operation. In other words, if the Indians require legal services and can not obtain such services until a contract has been ratified by Congress, nine chances out of ten Congress would never ratify a contract under which an attorney would be willing to perform the service." (*Ib.* 8965.)

Mr. Burke opposed the conference report, saying that until parties "have demonstrated that they have rendered some service or are entitled to compensation, or that there should be a contract," he hoped the matter would not be passed upon as proposed in the conference amendment (pp. 8966-8967).

Mr. Tawney, speaking further in support of the conference report, said that the only question involved was the fact that some legal services are necessary, and that this had been recognized by Senator Gore's amendment or proviso.

"That proviso," he said, "is that all contracts affecting the tribal money and property shall be null and void until the same are approved by Congress. That recognizes, I say, the necessity for legal services, which services are to be rendered under contract, which contracts under this provision are to be approved by Congress. That being so,"

continued Mr. Tawney, "and being most impracticable, the conferee's amendment was proposed as a substitute." (*Ib.* 8969.)

The House thereupon rejected the report and a further conference was held from which the proviso emerged in its present form. (H. R. Rep. No. 1731, 61st Cong., 2d sess.)

Before the passage of the proviso in this form, however, several Members of the House expressed their fear that some such situation might arise as now has arisen, and that the proviso made it very difficult for the tribes to employ counsel. Thus Mr. Tawney said:

"It may do an injustice and an injury to the Indians, however, if there is any necessity of their employing counsel between now and the next session of Congress" (p. 9090).

And Mr. Carter followed to the same effect, as follows:

"That is the point about which I wish to speak briefly. There are legitimate contracts with the regular standing attorneys of the Five Civilized Tribes. * * * I do not want to deprive the Indians at any time of having adequate representation, legal or otherwise; and I might not favor this amendment, Mr. Speaker, were it not for the extraordinary incidents that arose in the House and in another distinguished legislative body yesterday. * * * The fear I had in mind was that some of those contracts which are reasonable and legitimate might expire before the convening of Congress and leave the Secretary without authority to employ adequate counsel for the Indians" (p. 9090).

Notwithstanding these doubts Congress passed the bill.

In my opinion this congressional history puts it beyond question that employment of counsel to be paid out of the tribal funds was intended to be prohibited by Congress until it should have an opportunity to establish a final system satisfactory to it.

The Attorney-General before leaving town went over this subject with me and authorized me to say that this is also his own conclusion.

The third question which you present is as to the form of the proposed supplemental agreement in case execution

of a further agreement is permissible. The conclusion here reached makes it unnecessary to discuss this point.

Herewith, as requested, are returned the inclosures sent with your letter, as follows:

Copy of contract employing the firm of McCurtain & Hill, dated August 31, 1907.

Copy of bill No. 6 of November 30, 1908.

Copy of proposed supplemental contract.

Very respectfully,

WINFRED T. DENISON,
Acting Attorney-General.

THE SECRETARY OF THE INTERIOR.

PURCHASE OF SUPPLIES FOR THE EXECUTIVE
DEPARTMENTS.

Section 4 of the act of June 17, 1910 (36 Stat. 531), does not make it mandatory upon the Secretary of the Treasury to purchase all supplies required by the several executive departments, of the character named in that act, regardless of whether, as prescribed by the first proviso thereof, such articles are "in common use by or suitable to the ordinary needs of two or more such departments or establishments."

The power given the Secretary to add other articles to the common supply schedule is discretionary. If he does not choose to exercise the power and add to it after his attention is called to the matter, then the department or establishment concerned may purchase the article in the manner theretofore authorized by law; but if he does add it to the schedule, it must be purchased through the general supply committee.

The repealing clause, section 5, of the act of June 17, 1910 (36 Stat. 531), amended and modified the act of April 28, 1904 (33 Stat. 440), which creates the office of purchasing agent in the Post Office Department, only in so far as the latter is inconsistent with the former.

The Secretary of the Treasury has authority under section 4 of the act of 1910 to amend the annual common supply schedule by adding other articles of the character covered by the act at any time during the year that he may deem proper.

Telephone, electric light, and power service purchased or contracted for from companies or individuals should be obtained through the general supply committee.

The provision that "no department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau" does not limit the number of supply bureaus or offices in the several departments and establishments.

DEPARTMENT OF JUSTICE,
January 23, 1911.

SIR: I beg to acknowledge the receipt of your letter of the 5th instant, requesting my opinion upon certain questions arising in connection with the preparation of the annual schedule of supplies provided for in section 4 of the legislative, executive, and judicial appropriation act of June 17, 1910 (36 Stat. 468, 531).

The statute in question provides

“SEC. 4. That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other government establishments in Washington, when the public exigencies do not require the immediate delivery of the article, shall be advertised and contracted for by the Secretary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be a general supply committee in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committee shall be to make, under the direction of the said Secretary, an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties, and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may see fit to call upon, who shall render whatever assistance they may require. The committee shall aid said Secretary in securing the proper fulfillment of the contracts for such supplies, for which purpose the said Secretary shall prescribe, and all departments comply with, rules providing for such examination and tests of the articles received as may be necessary for such purpose; in making additions to the said schedule; in opening and considering the bids; and shall perform such other similar duties as he may assign to them: *Provided*, That the articles intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establish-

ments; but the said Secretary shall have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased. In all cases only one bond for the proper performance of each contract shall be required, notwithstanding that supplies for more than one department or government establishment are included in such contract. Every purchase or drawing of such supplies from the contractor shall be immediately reported to said committee. No disbursing officer shall be a member of such committee. No department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department: *And provided further,* That telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him."

It appears from your letter that you submitted to the Solicitor of the Treasury the question whether, under the provisions of this act, it is your duty to contract for all classes of supplies of the character mentioned in the act, regardless of whether the articles are in common use by two or more departments or establishments, and that in response he advised you as follows:

"In my opinion this statute intends that all supplies required by the departments, whether in common use by two or more departments, or in use by one department only, are to be advertised and contracted for by the Secretary of the Treasury, except when a public exigency requires the immediate delivery of the article, in which case the article may be purchased, without advertisement, and by the department concerned. If an article is not in common use by two or more departments, and is in use by one department only, that article is not to be placed on the schedule of supplies by the general supply committee, but is still to be advertised and contracted for by the Secretary of the Treasury, because there is no provision in the statute which expressly or impliedly permits any

department, except in the case of an exigency, to obtain supplies except through the Secretary of the Treasury."

You state that "this practice, if required by the law, has not been followed," and your first question is whether "it is mandatory upon the Secretary of the Treasury to contract for all classes of supplies in accordance with the Solicitor's opinion."

In my judgment, section 4 of the act of June 17, 1910, does not make it mandatory upon the Secretary of the Treasury to purchase all supplies of the character mentioned in the act, regardless of whether, as prescribed in the first proviso thereof, such articles are "in common use by or suitable to the ordinary needs of two or more such departments or establishments." By providing "that the articles intended to be purchased in this manner," that is, through contracts made by the Secretary with the aid of the general supply committee, "are those in common use by or suitable to the ordinary needs of two or more such departments or establishments," Congress limited the general duties of the Secretary and the committee to articles possessing such characteristics. By providing further, however, "*but* the said Secretary shall have discretion to amend the annual common supply schedule from time to time as to *any* articles that, in his judgment, can as well be thus purchased," Congress gave the Secretary a discretion as to adding other articles irrespective of the question whether they were in common use by or suitable to the ordinary needs of two or more departments or establishments. The Secretary being authorized to exercise his judgment as to the addition of any article to the schedule, there can be no mandatory duty resting upon him to exercise that power.

The fact, mentioned by the Solicitor, "that there is no provision in this statute which expressly or impliedly permits any department, except in the case of an exigency, to obtain supplies except through the Secretary of the Treasury" is immaterial, since authority in the other departments to make such contracts existed prior to the passage of the present act, which (sec. 5) merely

repeals "all laws or parts of laws inconsistent with this act." The primary object of the act in question is to effect the purchase, in the most efficient manner, having regard to quality and economy, of certain supplies in common use by or suitable to the ordinary needs of two or more departments or establishments. The authority given the Secretary to add other articles to the annual common supply schedule is, as stated, discretionary with him, having in view the objects intended to be accomplished. If he does not choose to exercise that power in any case, the department or establishment concerned is certainly not to be denied authority to purchase the desired article in the manner theretofore authorized by law. So, as to any article which might possibly be scheduled by the committee in the first instance, as being in common use, etc., if they fail to do so and the Secretary does not add it after his attention is called to the matter, authority would likewise exist in the department or establishment concerned to purchase it. In other words, the act is not to be construed so as to embarrass the operations of the Government.

This disposes of your first question.

Your second question is whether there is anything in the act requiring contracts for any classes of supplies except "common supplies" to be purchased through the medium of the general supply committee. In view of what has already been said, the answer to this question must be "yes, if the Secretary should conclude that any such supplies, being of the miscellaneous character referred to in the act, may as well be thus purchased, and add them to the common supply schedule."

Your third question is stated as follows:

"Does the law, in your opinion, require all purchases of all kinds of supplies contemplated by the act and intended for use in the field service outside of Washington to be made from the contractor under the general supply schedule, such, for example, as supplies for the Life-Saving Service, Public Health and Marine-Hospital Service, and the Postal Service? * * *"

Upon this question the Solicitor of the Treasury held that—

“departments and governmental establishments having field service must purchase their supplies under the general schedule; and from the contractor under the general supply committee, and not from an outside independent contractor.”

I am advised by a representative of the general supply committee that “to attempt to act in accordance with this opinion would require an amount of machinery with which the committee has not been provided,” and that, “on the other hand, a construction of the law which would limit the supplies in question to those used in the department buildings within the District of Columbia would so restrict the quantities that much of the valuable work done, and the progress already made looking toward a uniformity of supplies and prices, for which the general supply committee was established, would be nullified to a large degree if not entirely.”

The first sentence of section 4 refers to supplies “for the the executive departments and other government establishments *in Washington*,” but subsequently it is provided that “no department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department.”

This latter clause seems clearly to imply that the authority given you to advertise and contract for supplies “for the executive department and other government establishments in Washington” covers supplies required by such departments for “detached bureaus or offices having field or outlying service,” such bureaus or offices, however, being given the privilege, with the permission of the head of their department, to “purchase,” i. e., order, their supplies directly from the contractor. Thus, in my opinion of July 25, 1910, it was held that the authority of such bureaus or offices to order supplies directly from the contractor applied “to all of their supplies, those needed for use in the city of Washington, as well as elsewhere” (28 Op. 380, 383).

It will be observed that, as to supplies for detached bureaus or offices having field or outlying service, the limitations of the act with respect to the character of supplies also apply. Whether a given article used by the field service of a department, or a given service, comes within the statute, can only be determined as the case arises. Speaking generally, however, I may say that there seems to be no necessity for construing the act in such a way as to defeat its objects or embarrass the operations of any department or establishment of the Government. The general purpose of the act is to provide a method by which the Government may be enabled to secure a better class of supplies in a more economical way. If to schedule and standardize certain articles used by detached bureaus and offices having field or outlying service would subserve no such purpose but only embarrass the committee or the department concerned, the committee would seem to be justified in omitting them. The fact that the Secretary may amend the schedule from time to time by adding any article that in his judgment may as well be thus purchased will enable him to supply any omissions.

Your next question is as follows:

"In connection with the postal service, attention is invited to the act of April 28, 1904 (33 Stat. 440), which creates the office of purchasing agent in the Post-Office Department, and defines his duties. Please advise me if the repealing clause of the act of June 17, 1910, amends, modifies, or repeals the act of April 28, 1904."

The repealing clause of the act in question (sec. 5) repeals "all laws or parts of laws inconsistent with this act." It seems clear, therefore, that the act of April 28, 1904, was amended and modified only in so far as the act in question is inconsistent therewith. It follows that supplies required for the use of the Post-Office Department coming within the description "all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other government establishments in Washington" which are "in common use by or suitable to the ordinary needs of two or more such departments or establishments," and which have been placed by the general supply committee upon the annual supply schedule, as well as any article

of the miscellaneous character referred to added by the Secretary to such schedule, must, "when the public exigencies do not require the immediate delivery of the article," be advertised and contracted for by the Secretary of the Treasury, under the provisions of the act of June 17, 1910. Otherwise, the act of April 28, 1904, continues in force.

You next inquire whether the clause of the proviso to section 4, "but the said Secretary shall have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can be as well thus purchased," authorizes you "to make awards and revise the annual schedule at any time during the year" that you may deem proper.

It seems to me that, reading the language quoted by you in connection with the authority given you by the first sentence to advertise and contract upon such days as you may designate, an intention is clearly apparent to vest in you the discretion which an affirmative decision of this question would imply, and you are accordingly so advised. In saying this, I assume that by the word "revise" you mean to "amend" the annual common supply schedule by adding other articles of the character covered by the act.

I also answer in the affirmative your question whether the provision "that telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him," means that you "shall obtain such service through the medium of the general supply committee." This question has already been so decided in an opinion by the Acting Attorney-General of July 25th last (28 Op. 380).

Finally, referring to the provision that "no department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau," you inquire whether this requires "the establishment of a single supply division in each department which shall order and receive all materials needed for that department."

I see no reason for interpreting this clause to mean anything more or less than what its language plainly indicates. It does not purport to limit the number of supply bureaus or offices, but, for the purposes of more efficient administration, requires each department or establishment, whether

it has many or only one supply bureau, to "purchase or draw supplies from the common schedule" through a single supply office.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE TREASURY.

PUBLIC PRINTER—PURCHASE OF THE PRODUCT OF BIND-
ERY OPERATIONS

Sections 4 and 5 of the act of June 17, 1910 (36 Stat. 531), relating to the purchase of stationery and other miscellaneous supplies for the executive departments and other government establishments in Washington do not supersede or repeal section 87 of the act of July 12, 1895 (28 Stat. 622), and other provisions of law under which it is claimed the Public Printer has authority to purchase all articles that are manifestly products of the printing art and its kindred operations.

Blank books, press copy books, stenographers' notebooks, etc., which have been scheduled by the general supply committee, and are of a staple character usually carried in stock by commercial houses, do not come within the terms of section 87 of the act of January 12, 1895, which requires only that "printing, binding, and blank books," which it is necessary to have specially executed, manufactured, or made at the Government Printing Office, shall be "done" there, except as otherwise provided by law.

The Public Printer is, however, required to purchase from the schedule of the general supply committee any of the articles above referred to which are properly upon the schedule, where the same are required for the use of the Printing Office, but he is not required to purchase such articles from the schedule for the other departments or establishments of the Government, as they would be ordered through the Secretary of the Treasury.

The Public Printer is not required by law to supply a specifically described patented binding device on the requisition of an allottee of the appropriation for public printing and binding, the article being of a character required by section 87 of the act of July 12, 1895, to be "done" at the Government Printing Office, where in his opinion an article of different character is more in the interest of economy, uniformity, and better adapted to the needs of the service.

DEPARTMENT OF JUSTICE,

January 26, 1911.

SIR: I have the honor to submit herewith the opinion requested by you, under date of the 23d instant, upon certain questions raised by the Public Printer.

The questions presented, the provisions of law involved, and the circumstances giving rise to this request are stated

by the Public Printer in his letter to you of January 20, 1911, as follows:

Section 16 of the act of January 12, 1895 (28 Stat. 601), provides that—

“The Public Printer shall prepare a schedule of materials required to be purchased, showing the description, quantity, and quality of each article, and shall invite proposals for furnishing the same, either by advertisement or circular as the Joint Committee on Printing may direct, and shall make contracts for the same with the lowest responsible bidder, making a return of the same to the Joint Committee, showing the number of bidders, the amount of each bid, and the award of the contracts.”

Section 18 of the same act provides, in part, that—

“It shall be the duty of the Public Printer to purchase all materials and machinery which may be necessary for the Government Printing Office * * * .”

* * * *

Section 87 of the act of January 12, 1895, provides that—

“All printing, binding, and blank books for the Senate or House of Representatives and for the executive and judicial departments shall be done at the Government Printing Office, except in cases otherwise provided by law.”

* * * *

Section 4 of the act of June 17, 1910 (36 Stat. 531), provides in part—

“That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other government establishments in Washington, when the public exigencies do not require the immediate delivery of the article, shall be advertised and contracted for by the Secretary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be a general supply committee in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committee shall be to make, under the direction of the said Secretary, an annual schedule of required miscellaneous supplies, to

standardize such supplies, eliminating all unnecessary grades and varieties, * * * *Provided*, That the articles intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments; but the said Secretary shall have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased;" and section 5 of the said public act provides—

"That all laws or parts of laws inconsistent with this act are repealed."

The general supply committee provided for in section 4 of the act quoted *supra*, acting under authority claimed from the said act, prepared a schedule, which includes, among others, the following items:

"Item No. 7. Books, blank, record, day or ledger ruling, as may be ordered, 100 pages to 1,000 pages each;

"Item No. 8. Books, faint line, or ruled for dollars and cents, as may be ordered;

"Item No. 10. Books, press copy, high grade, paged, half bound, cloth sides, indexed one leaf to each letter, blotter after each leaf or index;

"Item No. 11. Books, scrap, manila paper, leather backs and corners, paged and indexed, 12 by 10 inches outside measurement, 175 leaves;

"Item No. 13. Books, stenographer's note, flexible covers, well bound, suitable for pen or pencil, 4½ by 9 inches, 80 leaves;

"Item No. 14. Books, stenographer's note, stiff covers, well bound, suitable for pen or pencil, 4½ by 9 inches, 80 leaves;

"Item No. 39. Devices, binding, loose leaf" (after which follows specific descriptions of the various styles of what are known as "loose-leaf binders").

All of the articles referred to as appearing in the general supply schedule are clearly comprehended within the terms of section 87 of the act of January 12, 1895, quoted *supra*, and it appears that unless the procuring of the said articles is provided for by law otherwise than as mentioned in the said section 87, they should all be manufactured at the Government Printing Office, except as the Public Printer,

in the exercise of the discretion vested in him by the provisions of section 51 of the act of January 12, 1895, providing that—

“The forms and styles in which the printing or binding ordered by any of the departments shall be executed and the material and size of the type to be used shall be determined by the Public Printer, having proper regard to economy, workmanship, and the purposes for which the work is needed”—

may deem it necessary to purchase the same under the authority vested in him by that part of section 1 of the act approved June 28, 1902 (32 Stat. 481), which provides that—

“The Public Printer is authorized hereafter to procure and supply, on the requisition of the head of any executive department or other government establishment, complete manifold blanks, books, and forms required in duplicating processes, also complete patented devices with which to file money order statements or other uniform official papers, and to charge such supplies to the allotment for printing and binding of the department or government establishment requiring the same.”

The act approved June 17, 1910, a part of section 4 and section 5, all of which are quoted supra, are not regarded as superceding or repealing any of the provisions of the law under which it is claimed the Public Printer has authority to purchase all articles which are manifestly products of the art of binding and its kindred operations.

* * * * *

Upon consideration of the premises these questions arise:

(1) Is the Public Printer required by law to purchase the product of bindery operations from the schedule of the general supply committee?

(2) Is the Public Printer required by law to supply a specifically described patented binding device on the requisition of an allottee of the appropriation for public printing and binding, when in the Public Printer's discretion an article of different character is more in the interest of economy, uniformity, and better adapted to the needs of the service?

1. The first question—whether the Public Printer is required by law to purchase the product of bindery operations from the schedule of the general supply committee—involves a consideration of the authority of the general supply committee to schedule such articles. From the letter of the Public Printer it appears that he is of the opinion that the blank books, etc., which he says have been scheduled by the general supply committee are within the terms of section 87 of the act of January 12, 1895 (28 Stat. 601, 622), and should all be manufactured at the Government Printing Office, except as the Public Printer might deem it necessary to purchase in the exercise of the discretion vested in him by law.

Section 87 of the act of January 12, 1895, provides that “all printing, binding, and blank books for the Senate or House of Representative and for the executive and judicial departments shall be done at the Government Printing Office, except in cases otherwise provided by law.”

Undoubtedly, as stated by the Public Printer, this and the other provisions of law referred to by him, and under which he claims authority “to purchase all articles which are manifestly products of the art of binding and its kindred operations,” are not repealed by sections 4 and 5 of the act of June 17, 1910.

I assume, however, that the blank books, press copy books, stenographer's notebooks, etc., which have been scheduled by the committee are those of a staple character usually carried in stock by commercial houses and are not such as are required to be made to order. This being so, it may well be held that such articles do not come within the terms of section 87 of the act of January 12, 1895. It seems a fair reading of that provision to say that it only requires “printing, binding, and blank books,” which it is necessary to have specially executed, manufactured, or made to be “done” at the Government Printing Office, except in cases otherwise provided by law.

I understand that it has always been the practice of this department to purchase supplies of this character upon contracts awarded as the result of competitive bids, the Public Printer being permitted to compete, such articles not being regarded as coming within the provisions

of section 87 of the act of January 12, 1895, for the reasons stated. So far as I am aware, this has also been the view of the other departments. This practical interpretation of the law should, I think, be regarded as conclusive, especially as it appears to be founded upon the reasons of economy which underlie all the supply statutes.

If, therefore, any articles, like those mentioned, have been properly scheduled by the general supply committee, acting under authority of section 4 of the act of June 17, 1910, the Public Printer is required by that act to purchase such articles from that schedule for the use of his own establishment, so far as it is necessary for him to purchase them at all, like any other department or establishment of the Government, and the provisions of law relating to his establishment, if inconsistent therewith, must be regarded as modified to this extent. This was so held, in substance, in the opinion rendered the Secretary of the Treasury on July 25, 1910 (28 Op. 380, 383), although that opinion dealt particularly with the Bureau of Engraving and Printing. The Public Printer would not, however, be required to purchase such articles from said schedule for other departments or establishments of the Government, because the other departments and establishments would order them through the Secretary of the Treasury and the general supply committee, as provided by the act of June 17, 1910, and not through him. In other words, with any "product of bindery operations," properly scheduled by the general supply committee, the Public Printer is concerned only in so far as respects the needs of his own establishment.

2. The second question propounded by the Public Printer should, I think, be answered in the negative. Section 1 of the act of June 28, 1902 (32 Stat. 481), quoted in the letter of the Public Printer, merely *authorizes* the Public Printer, on the requisition of the head of any executive department or other government establishment, to procure and supply the articles therein referred to. This provision must be construed in the light of section 51 of the act of January 12, 1895, which provides that "the forms and style in which the printing or binding ordered by any of the departments shall be executed, and the

material and the size of type to be used, shall be determined by the Public Printer, having proper regard to economy, workmanship, and the purposes for which the work is needed." If the article referred to in this question is of the character required by section 87 of the act of January 12, 1895, to be "done" at the Government Printing Office, as that section has hereinbefore been interpreted, I think the Public Printer is vested by the act of January 12, 1895, with such discretion as to how the work shall be executed as to preclude the idea that there is any peremptory duty resting upon him under the act of June 28, 1902, "to supply a specifically described patented binding device on the requisition of an allottee of the appropriation for public printing and binding, when in the Public Printer's discretion an article of different character is more in the interest of economy, uniformity, and better adapted to the needs of the service."

Respectfully,

GEORGE W. WICKERSHAM.

The President.

BOISE NATIONAL FOREST—PREFERENTIAL RIGHT OF SELECTION BY STATE.

The right of the State of Idaho to make lieu selections of public lands pursuant to proceedings taken and a survey had under the act of August 18, 1894 (28 Stat. 394), was defeated by the President's proclamation setting aside the lands in question as part of a forest reservation (34 Stat. 3058), such proclamation having been promulgated after the filing of the State's application for survey but before the filing of any list of selections on its behalf.

The application of the State was not a "filing" within the meaning of that clause of the proclamation which purports, on certain conditions, to except from its operation, "All lands which may have been, prior to the date hereof, * * * covered by any lawful filing duly of record in the proper United States Land Office."

Notwithstanding the State's application for a survey the lands in question remained "public lands" within the meaning of section 24 of the act of March 3, 1891 (26 Stat. 1103), empowering the President to set apart "public lands" as forest reservations.

Opinion of September 15, 1907 (27 Op. 605), affirmed and extended.

DEPARTMENT OF JUSTICE,

January 30, 1911.

SIR: By my opinion of September 15, 1909 (27 Op. 605), you were advised that certain lieu selections of public land

attempted by the State of Idaho pursuant to its application for survey made under the act of August 18, 1894 (28 Stat. 394), were defeated by a proclamation of the President, promulgated after the application but before the survey and selection, and including the lands in question within the limits of the Saw Tooth (now Boise) National Forest (34 Stat. 3058). The details of the various proceedings taken, as well as the statutory provisions involved, were set forth fully in the opinion and need not be here repeated. I there held, in substance, first, that the State's application was not a "filing" within the meaning of the exception in the proclamation, and second, that the steps which had already been taken by the State when the proclamation was issued fell short of creating any vested right as against the United States. Thereupon you rendered a decision adverse to the selections (38 L. D. 219). As appears by correspondence since addressed by you to me, the attorney-general of Idaho, at a further hearing allowed by your office, has again urged that the selections should be approved for reasons which, he strongly insists, have not heretofore been given due consideration, in view of which you inquire whether I desire to adhere to my opinion.

The main argument of the State, as revealed by the briefs transmitted by you, is twofold. First, it is contended, contrary to the conclusion reached in my former opinion, that it was not the intention of the proclamation to abridge or destroy any opportunity which the State might otherwise have enjoyed to select or acquire, after survey, any of the lands described in its application.

The other and more important contention is to the effect that a contrary purpose, if entertained by the President, would be violative of the law.

The first proposition is based upon the concluding portion of the proclamation, which reads as follows:

"Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land

Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired: *Provided*, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing or settlement was made."

The contention here is that the State's application for survey was "a lawful filing duly of record in the proper United States Land Office," and was therefore protected by this saving clause. Of course the application, having been filed pursuant to law in a public office, may be spoken of in a generic way as a "filing." That, however, is not the sense in which the term is used in the proclamation. In relation to public land matters the word "file" has acquired a definite and well understood meaning of a more narrow scope, denoting the act of lodging with the land-office officials some instrument accompanying and declaring a claim to a definite parcel of land. Thus it is common to say that a claimant has filed on a quarter section of land under the homestead law, referring to the initial homestead application which first manifests of record the existence of his claim to that particular tract. So of applications for specific parcels under other laws. The pervading idea derives its character from the purpose and effect rather than the physical act of filing the instrument. In the usual and generic sense, the term "filing" denotes the act alone and carries not even a suggestion of its purpose or legal significance. The special meaning grew out of the constant association of the act of filing with the making of claims to specific parcels of land under the general land laws. In construing the proclamation it is the fair, and, indeed, the only safe course, to assume that this word, being found in a connection which precludes the generic meaning, was used as it had theretofore been used in its special applications, and with reference to the sort of claims and land-office proceedings out of which its peculiar meaning was derived. To hold that a mere application for a survey under the act of 1894 is a "filing"

upon all of the region described in that application would stretch the meaning of the term far beyond its previous conception and would tend toward the destruction of the special meaning entirely. I do not believe that any one would contend otherwise if the application were directed solely to the procurement of a survey. It is the preferential right of selection arising with the application which alone lends color to the effort to characterize it as a "filing." But that is essentially a right to forestall new claims of others until the sections shall have been identified and the State shall have had its opportunity to examine them, satisfy itself in regard to their value, and applicability to its grants, and thereupon make such selections as it may deem advisable. It does not carry with it any obligation to make any selection, nor any presumption that any of the sections when ascertained will prove to be free from prior claims, or of the character of land which the State is authorized to select. Some or all of the lands may turn out to be mineral lands. Some or all may have been previously settled upon or otherwise appropriated. Yet the application for survey will have covered all of them—those which lie beyond the reach of the State as well as those which when identified it may lawfully acquire should it choose to do so. In no proper sense, therefore, can the State be said to make a claim to the land described, or any part of it, prior to actual selection of specific tracts. Then the list embodying such selections, when filed with the land officers, would doubtless constitute such a "filing" as the proclamation intends.

The conclusion here reached is fortified by the associations of the word "filing" in the proclamation. "Entry" and "settlement" import rights or claims to designated parcels. "Filing," where it occurs the second time, plainly refers to claims based on settlement. And the *proviso*, that the exception "shall not continue to apply to any particular tract of land, unless the entryman, settler, or claimant continues to comply with the law under which the *filing* or settlement was made," would appear to place the matter beyond controversy.

The other point—that the proclamation as I have just construed it, would violate the law—is made in part upon the proposition that, with the filing of the application for survey, the lands ceased to be such “public lands” as the President was authorized to reserve (act of Mar. 3, 1891, sec. 24, 26 Stat. 1103); and in part upon the declaration of the act of 1894 that the lands covered by such application “shall be reserved upon the filing of the application for survey *from any adverse appropriation by settlement or otherwise* except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim.” In the latter connection, it is argued that the words “any adverse appropriation” were intended to include an appropriation of public lands by the Government for forest purposes through the action of the President.

The act of 1891 (*loc. cit.*) empowered the President, “from time to time” to “set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber,” etc., “as public reservations,” and directed him to declare by public proclamation “the establishment of such reservations and the limits thereof.”

The case does not call for an attempt to define generally what was there intended by “public lands.” That is a term which is susceptible of various meanings, according to the connections in which it is found. In the restricted sense in which it is employed in acts looking to the disposition of the title or the granting of privileges—and this is undoubtedly the sense in which it most frequently appears in litigation—it means the lands of the United States which are open to acquisition by the qualified first comer under some one or more of the general land laws—lands which are not withheld from such acquisition by any subsisting right or claim in another, or any act of the Gov-

ernment. In the absence of reasons for a contrary interpretation, this, as has been frequently held, is the meaning which should be adopted; but it is not the only possible meaning. Thus, in the recent case of *Union Pacific v. Harris* (215 U. S. 386, 388) the court said:

"The grant of the right of way was 'through the public lands.' What is meant by 'public lands' is well settled. As stated in *Newhall v. Sanger* (92 U. S. 761, 763), 'the words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' * * * If it is claimed in any given case that they are used in a different meaning, it should be apparent either from the context or from the circumstances attending the legislation."

And in *United States v. Blendaur* (128 Fed. 910, 913), where the Circuit Court of Appeals for the Ninth Circuit decided that lands, formerly part of an Indian reservation, which were by law set apart specially for homestead entry, were nevertheless such "public lands" as the President was authorized to reserve under section 24 of the act of March 3, 1891, it was said:

"The words 'public lands' are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results. There are many cases where the courts have been called upon to decide the meaning of these words. In *United States v. Bisel* (8 Mont. 20, 30; 19 Pac. 251) the court, after referring to the decisions in *Wilcox v. Jackson*, *Newhall v. Sanger*, and other cases, said:

"There is no statutory definition of the words "public lands," and the meaning of them may vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of Congress in their use."

In a broad sense, as the United States can have no property which is not public property (*Van Brocklin v. Tennessee*, 117 U. S. 151, 158), all the lands which it owns are

"public lands," whatever, at a given time, may be their status in relation to possible acquisition of title from the Government. The term "public lands" and the term "public domain," held to be its equivalent (*Barker v. Harvey*, 181 U. S. 481, 490), exist in many provisions of law, civil and criminal, the purposes of which have obviously no relation whatever to any change of title. Take, as one instance only, the provisions against willfully setting out or leaving fires on the "public domain" (Penal Code, secs. 52, 53; 29 Stat. 594; 31 Stat. 170). Does any pressing reason suggest itself why this legislation, though highly penal, should not be held applicable to lands within a forest reservation? And would it be reasonable to say that its application to the lands now in question ceased when the State filed its request to have them surveyed?

Illustrations like this, though not of course conclusive, indicate how unsafe it may be to lay down any hard and fast rule for the interpretation of a term which Congress undoubtedly has used in the past, and may be expected to use in the future, in varying degrees of significance. Whether these lands, notwithstanding the proceedings taken by the State, are still to be regarded as "public lands" for the purpose of reservation by the President may best be decided, not by resort to a definition or upon any insulated view of that term, but by consideration and comparison of the two enactments involved.

The substantial object of the legislation of 1891, was obviously not to bestow a power or privilege upon the President, but rather to declare a policy which Congress deemed important to the public welfare, and to provide expedient means for its accomplishment. The discretion reposed and the power conferred implied a duty to exercise them; the President came under an obligation to make reservations of suitable land whenever and wherever, in his judgment, they should be made to carry out the general plan of Congress—a plan of which this executive participation was itself a material and important element. A repeal, therefore, in whole or in part, of the authority thus conferred upon the President, could only mean a

renunciation in a corresponding degree of the policy of Congress touching forest reservations. And the same may be said of legislation which would render it possible for States to suspend or seriously interfere with the President's ability to set aside forest reservations within their borders. But this is precisely what could be accomplished under the act of 1894 if construed as the State of Idaho believes it should be. By the mere filing of applications and making of publications this important function of the President could be entirely suspended as to vast areas of the unsurveyed public domain for long periods of time. In this way reservations might be defeated upon the very eve of their creation. It is not, of course, to be assumed that the States would deliberately abuse such a power; but, on the other hand, it is not out of the way to suppose that they might exercise it in their own interest so liberally as seriously to handicap the President in his efforts to set apart timbered lands which he believed should be reserved for the federal purpose.

Upon the general principles that acts granting property or privileges are to be strictly construed in favor of the Government (*Dubuque & Pacific R. Co. v. Litchfield*, 23 How. 66, 88), that in the absence of specific language or necessary implication to the contrary, the sovereign is excepted from the operation of general laws, which tend to divest of any right, privilege, title, or interest (*United States v. Herron*, 20 Wall. 251, 263; *Dollar Savings Bank v. United States*, 19 Wall. 227, 239), and that repeals by implication are not favored (*Frost v. Wenie*, 157 U. S. 46, 58); I am obliged to conclude that the legislation of 1894—notwithstanding its evident purpose to realize for the States named the bounties in land which Congress had extended to them, and notwithstanding the general language reserving the areas which they ask to have surveyed from “any adverse appropriation by settlement or otherwise”—was not designed to empower the State to withdraw public lands from the operation of the provisions of the act of 1891, to any extent or in any way not previously permissible.

The act of 1894 was evidently intended, first, to expedite the surveys, so that the lands might be identified for selection, and second, to hold off new claimants (who otherwise might anticipate the States), until the surveys had been approved and the States had enjoyed a reasonable opportunity thereafter to make their selections. It was intended to effect a readjustment of the relations previously existing between the States and other beneficiaries of the land laws, but not to confer upon the States any privilege which they did not already possess to precede the Government in appropriations of land. This view appears to conform entirely with the purpose of the legislation as it was understood by the executive officials who drafted it, and by the Representative who introduced it in its original form (as an amendment to an appropriation bill) and explained it on the floor of the House. (See proceedings and official correspondence, Cong. Rec., vol. 26, pt. 3, pp. 2955-2959; also Senate proceedings, *ib.*, vol. 26, pt. 8, pp. 8020-8021.)

The facts that the State of Idaho expended money to cruise the land and advanced funds for the survey, and that, notwithstanding the proclamation, the survey was proceeded with at the expense of the State, while they help to emphasize the hardship of the situation in which the State has been placed, can not, in my opinion, affect the foregoing conclusions. Undoubtedly any moneys which it paid to the Government or its officials by way of fees, survey expenses, or otherwise, upon the faith of its application, ought, *ex æquo et bono*, to be refunded. I am greatly impressed, also, by the representations made concerning the disappointment and loss which have come to the State from its inability to obtain the lands which were supposedly granted to it by Congress.

Very respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE INTERIOR.

INTERNAL REVENUE—RECLAMATION OF ALCOHOL FROM
THE STAVES OF EMPTY SPIRIT PACKAGES—ATTORNEY-
GENERAL, OPINIONS.

The Attorney-General can not properly express an official opinion upon the legality of certain orders issued by the Commissioner of Internal Revenue prohibiting the reclamation of alcohol from the staves of empty spirit packages, in the absence of affirmative proof that such alcohol had been properly tax paid, for the reason that the question has been decided by the Treasury Department, and is presented merely because of the request of counsel for parties interested, and for the further reason that the question must ultimately be decided by the courts.

DEPARTMENT OF JUSTICE,
January 30, 1911.

SIR: I beg to reply to your letter of October 7, 1910, requesting my opinion upon certain questions in respect to the extraction of alcohol from the staves of empty spirit packages.

An earlier response has been delayed in order that briefs might be prepared and filed by counsel for various parties interested, as was requested by them. Several such briefs have been presented, as well as a memorandum by the Commissioner of Internal Revenue, and the matter has received careful consideration. I regret to say, however, that the circumstances are such as to make it inadvisable for me to attempt to formulate an opinion upon these questions as they now arise.

It appears that the questions presented involve the legality of certain orders issued by the Commissioner of Internal Revenue, the purpose of which is to prohibit the reclamation of spirits from such packages in the absence of affirmative proof that such spirits had been properly tax-paid. The papers in the case show that these orders were issued under your direction and that the Commissioner and the Solicitor of Internal Revenue, as well as yourself, are fully satisfied that your action in the premises is correct, the questions referred to being presented for my consideration merely because of the request of counsel for the parties interested.

There are numerous precedents to the effect that the Attorney-General is precluded from rendering opinions

under such circumstances. In an opinion of August 17, 1892 (20 Op. 440), it appeared that the Treasury Department had reached conclusions upon certain questions which had arisen or might arise therein under a statutory provision, and that an opinion was desired as the "correctness of the interpretations and applications of said law." In declining to accede to this request it was said (*ib.* 441-442):

"It is required not only that the question must be one arising in the administration of a department, but it must be one which is still pending. A matter which has been considered and decided is not now a 'question' upon which the head of a Department may require an opinion of the head of the Department of Justice."

An opinion reported in 3 Op. 39 likewise decides that the Attorney-General does not possess the power to revise the decisions of an executive department, deliberately made and entirely satisfactory to the Secretary thereof.

It appears, moreover, that a proper determination of the questions presented can not be accomplished without considerable difficulty, and that the questions are essentially judicial in their nature. There is also every reason to believe that if an opinion should be rendered sustaining the validity of the orders in question, parties interested would resort to the courts for the purpose of having the matter judicially investigated and determined. That it is not proper for the Attorney-General to express an opinion upon a question which must ultimately be decided by the courts has been settled by numerous and unequivocal precedents (Digest Op. 46-48).

Furthermore, it appears that the orders referred to are apparently supported by a decision of the Circuit Court of Appeals for the Seventh Circuit (*Hunter v. Corning*, 86 Fed. 913), although the application of that decision is contested.

In a letter to the President's Secretary in regard to this matter, which has been called to my attention, you state:

"The parties have their remedy in the courts, and they have been offered permission—pending the decision of the courts—to continue their business on the furnishing of

bonds to pay the Government from this date, if the decision is sustained."

Under all the circumstances, it seems clear that it would not be proper to attempt to give you the advice requested.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE TREASURY.

FIELD ASSISTANT ON THE GEOLOGICAL SURVEY—ACCEPTANCE OF AN ORDER FROM THE KING OF SWEDEN.

A field assistant on the United States Geological Survey designated as special agent, whose service is not continuous, who is paid by the day when actually employed, and who does not take any oath of office, is not an officer under the United States within the meaning of Article I, section 9, paragraph 8, of the Constitution, and he may therefore accept from the King of Sweden the order of the "Knighthood of the North Star."

DEPARTMENT OF JUSTICE,

February 3, 1911.

SIR: I have the honor to respond to your communication of January 18, in which you transmit a copy of letter to you from Hon. James McKinney, Representative in Congress, and ask my opinion whether Prof. J. A. Udden, special assistant on the United States Geological Survey, may accept from the King of Sweden the order of the "Knighthood of the North Star," which that Sovereign has conferred on him, in view of Article I, section 9, paragraph 8, of the Constitution of the United States, which provides that—

"No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

Upon inquiry of the Chief Geologist of the United States Geological Survey, I am informed by him that the facts respecting the status of Professor Udden are these:

He was employed under Civil-Service Rule VIII as field assistant, grade four (designated as special agent in this case);

He is employed by the chief geologist, with the approval of the director, under authority of the Civil Service Commission;

His work is indefinite in term, his employment being from time to time during the year, with the limitation that the compensation is not to exceed \$300 in any one year;

He is paid by the day when actually employed, at \$5 per day;

He does not take any oath of office, and, in reply to the question: "Do his duties require a continuous service, or only as they may be occasionally called for by his superior?" the answer is: "Only occasional work."

Under these conditions I am of the opinion that Professor Udden can not be called an officer under the United States within the meaning of the provision above quoted. (*United States v. Germaine*, 99 U. S. 508.)

I have the honor, therefore, to advise you that there is nothing in the Constitution or laws to prevent the acceptance by Professor Udden of the order conferred upon him by the King of Sweden.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF STATE.

CUSTOMS LAW—IMPORTATION OF TORPEDOES FOR THE UNITED STATES.

Whitehead torpedoes imported from Europe into the United States to be distributed among the torpedo-boat destroyers of the United States are dutiable under the tariff act of August 5, 1909 (36 Stat. 11), but until they are carried to a place where there is a port collector where they may be entered, and the duties ascertained and paid, no duty would become payable.

DEPARTMENT OF JUSTICE,

February 4, 1911.

SIR: I have the honor to acknowledge the receipt of your communication of January 28, in which you state that your department is contemplating ordering in Europe some Whitehead torpedoes, which upon arrival would be distributed among the torpedo-boat destroyers and sub-

marines without landing them; but that after being used some of the torpedoes will have to be landed from time to time for the purpose of repairs, or to be stored in the event the vessels go out of commission; and you ask whether under these circumstances the torpedoes can be admitted to the United States free of duty.

The existing tariff law, approved August 5, 1909 (36 Stat. 11), enacts that—

“there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila), the rates of duty which are by the schedules and paragraphs of the dutiable list of this section prescribed.”

The same statute in section 28 provides the method for entering important merchandise and for the ascertainment of the amount of duties payable upon any particular importation. The essential feature to be considered in this connection being that an invoice of the merchandise made out in the currency of the place or country from whence the importation shall be made, duly certified by a consular officer of the United States, shall be produced to the collector of the port, or his deputy, at which the goods are entered. Until therefore the torpedoes which you contemplate purchasing are carried to a place where there is a port collector through whose office the entry can be made and the duties ascertained and paid as a practical matter, no duty would become payable. Assuming, however, that the torpedoes are brought to such a port, in my opinion they can not be admitted to the United States free of duty. This precise question was considered by this department and determined by an opinion rendered February 9, 1892, by Solicitor-General Taft (20 Op. 314), in which he advised the Secretary of the Treasury that the bituminous coal imported for the use of the Government was dutiable. In that opinion he said that:

“In the tariff act of 1874, Revised Statutes, section 2505, page 483, there was a provision that all articles imported for the use of the Government should come in free. This was part of the free list of the tariff act of 1874. In the

tariff act of March 3, 1883, under paragraph 645, in the free list of that act, a similar provision was made. No such provision is contained in the free list of the act of October 1, 1890. The omission of such a provision, in view of the previous legislation, would seem to show necessarily the intention of Congress not to exclude from the operation of the act articles imported for the benefit of the United States."

By the tariff act of 1894, par. 385 (28 Stat. 537), articles imported by the United States were again placed upon the free list, but in both the tariff acts of 1897 and 1909, such articles were again omitted therefrom; and the reason assigned by Solicitor-General Taft as necessarily showing that it was the intention of Congress that they should not then be imported free of duty, is equally applicable under the present condition of the law, and excludes them from importation without payment of duty.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE NAVY.

PUBLIC PRINTER—AUTHORITY TO DISCONTINUE THE
OPERATION OF BRANCH PRINTING OFFICES.

The Public Printer can not discontinue the operation of the branch printing offices as branch offices, except the specific offices mentioned in the proviso of section 31 of the general printing act of January 12, 1895 (28 Stat. 605), to wit, those in the Weather Bureau and the Record and Pension Division of the War Department, even though he transfers the employees and plants thereof, either in whole or in part, to the Government Printing Office building, and there continues the work hitherto performed in the branch offices.

DEPARTMENT OF JUSTICE,

February 6, 1911.

SIR: I am in receipt of a letter addressed to you by the Public Printer under date of December 9, 1910, in which he requests my opinion as to whether or not he has legal authority

"to transfer the employees, machinery, material, equipment, and supplies constituting any one or more of the branch printing offices, or so many or such part of the

same as may be necessary, to the Government Printing Office building, and perform the work hitherto performed in the branch office or offices so transferred, in the Government Printing Office, where such transfer meets with the consent and approval of the head of the Department or Departments for whose convenience said branch office or offices was created, and when in the opinion of the head of the Department or Departments and the Public Printer the transfer tends to promote the best interests of the service, and the work of printing for the Department or Departments would be in no wise retarded."

In connection with this question he refers to my opinion dated March 28, 1910 (28 Op. 232), in which I advised that "no power is conferred upon the Public Printer, of his own motion, to abolish any branch printing office; nor, with the consent of the Joint Committee on Printing, to abolish any except" the specific offices mentioned in the proviso of section 31 of the general printing act of January 12, 1895 (28 Stat. 601).

In reference to the question now presented, I am of opinion that the Public Printer can not discontinue the operation of the branch printing offices even though he transfers the employees and plants thereof either in whole or in part to the Government Printing Office building, and there continues the work hitherto performed in the branch offices.

The pertinent portion of the general printing act is section 31 (28 Stat. 605), which is quoted in full in my said opinion of March 28, 1910.

That section evidently contemplates the separate existence of departmental offices as branches. For instance, it describes them as "printing offices in the Departments," and "offices for Departmental work." Similarly it provides that "all persons employed in *said printing offices and binderies* shall be appointed by the Public Printer, and be carried on his pay roll *the same as employees in the main office;*" and it requires the Public Printer to show "in detail in his annual report the cost of operating *each Departmental office.*"

This view of the purpose of the act is confirmed by the fact that the power in question is specifically granted with

reference to the Patent Office work, by a clause in section 73 (28 Stat. 620) providing that the work for this particular office "may be done at the Government Printing Office whenever in the judgment of the Joint Committee on Printing the same would be to the interest of the Government."

The Senate Committee which had charge of the bill, which subsequently became the general printing act above referred to, in their report clearly showed that the purpose of the bill was not to bring about the physical union of the several branches with the Government Printing Office, but merely to place these branches under the supervision of the Government Printer. In discussing section 31, which at that time was designated section 32, the report said (Senate Report 1549, 52d Cong., 1st sess.):

"This section is new. At the present time there are four branch offices, namely, one in the Treasury Department, one in the Interior Department, one in the Navy Department, and one in the State Department, under the control of the Public Printer. These are branch offices of the Government Printing Office. Besides these there are printing establishments in the Post-Office, War, and Agricultural Departments, one in the Weather Bureau, and one in the Surgeon-General's Office, which are not branch offices, and have been in operation some considerable length of time, without doubt in violation of the law, which reads, 'That all printing and binding and blank books for the Senate and House of Representatives and Executive and Judicial Departments shall be done by the Government Printing Office, except in cases otherwise provided by law.' It was deemed best by the committee, after a full investigation into the matter and visiting all of the Departments where printing was done, that it would be in the interest of the public service and on the line of economy to place all of these offices under the Public Printer and to denominate them 'branch office of the Government Printing Office,' and to provide that all offices hereafter established by law shall be placed under his direction and be under his control. This seems to meet with the approval of the heads of the Executive Departments and of the Public Printer. The heads of the Departments have stated in writing that

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printing offices in the Departments are necessary, and their existence is in the interest of the public service and on the line of economy."

A like report was submitted to the Senate in the next Congress by which the bill was eventually passed (Senate Report 574, 53d Cong., 2d sess.).

Finally Congress has itself, since the passage of the general printing act, indicated that Congressional action was necessary to bring about the transfer of the operations of a branch office to the General Printing Office by specially authorizing such transfer in the case of the Census Office. This was done by section 11 of the act of March 6, 1902 (32 Stat. 51, 53).

I am therefore of opinion, as above stated, that the Public Printer has not the authority to discontinue the operation of the branch offices as branch offices, excepting in the case of those in the Weather Bureau and the Record and Pension Division of the War Department, which are in terms excepted by section 31 of the general printing act.

Very respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

STATE TAX ON AUTOMOBILES PURCHASED FOR PRESIDENT.

Automobiles purchased for the President under appropriations made by Congress are not subject to taxation by a State, nor can the chauffeurs operating said machines be taxed by a State for the privilege of performing the duties pertaining to their employment.

A State may, however, in order to protect the public against dangers that might arise from performing the duties of a lawful employment in an unlawful manner, adopt reasonable police regulations which require that certain conditions be complied with before entering upon such occupation, and the fees intended merely to pay the expenses of complying with these requirements may be exacted.

DEPARTMENT OF JUSTICE,

February 10, 1911.

SIR: I have the honor to acknowledge receipt of your communication of January 31, 1911, in which you inclose copies of acts passed by the legislatures of the States of

Maryland and Virginia relative to the operation of automobiles in those States, and you ask my opinion as to the right of a State to impose a tax upon automobiles purchased for your use under appropriations made by act of Congress, and to require the payment of a license fee for chauffeurs operating the same.

These automobiles, as I understand, were purchased under authority of act of Congress and were paid for out of funds appropriated for the contingent expenses of the executive office; and the chauffeurs are employees of the Government, and their services are paid for out of the same appropriation.

As these automobiles are property of the United States, they are not subject to taxation by a State.

McCulloch v. Maryland (4 Wheat. 316).

Osborn v. Bank of United States (9 Wheat. 738).

Bank Tax Case (2 Wall. 200).

Society for Savings v. Coite (6 Wall. 594).

Dobbins v. Commissioners of Erie County (16 Pet. 435).

Railroad Co. v. Peniston (18 Wall. 5).

McGoon v. Scales (9 Wall. 23).

Van Brocklin v. State of Tennessee (117 U. S. 151).

Furthermore, since the chauffeurs are paid out of funds appropriated by the United States, and are under their employment in charge of property belonging to the Government, and are engaged in the performance of services on behalf of the United States, it is equally certain that they can not be taxed by a State for the privilege of performing the duties pertaining to their employment.

But there is another principle which has an important bearing upon the question under consideration, and that is the right of a State under its police power to enact and enforce regulations designed to promote the public welfare.

It does not follow that because one is employed by the United States to perform a service authorized by its laws, and in connection with its property, he is entirely free from state control as to the method by which it shall be performed in a State. If such service is one which may, if done in a reckless and negligent manner, become a menace to the safety of individuals, then the State has the right to

require of the employee of the Government that such service be performed with due caution and care. When the United States creates a position and prescribes the duties incident thereto, it assumes that they will be performed in a lawful manner, and does not undertake to shield its employees against liability for doing them negligently. In fact the laws of the United States do not in any respect authorize willful misconduct or negligence upon the part of its employees, and there is no principle better recognized than that a government employee or official is liable for all damages that may result from an unauthorized act.

The Flying Fish (2 Cranch 170, 179).

Mitchell v. Harmony (13 How. 115).

United States v. Russell (13 Wall. 623).

Cammeyer v. Newton (94 U. S. 225, 234).

This being true, I think it necessarily follows that when a State has deemed it advisable, in order to protect the public against dangers that might arise from performing the duties of a lawful employment in an unlawful manner, to adopt reasonable regulations which require that certain conditions be complied with before entering upon such occupation, one can not excuse himself from complying therewith on the ground that he is employed by the United States Government. For illustration, suppose the United States should undertake to construct a public building in the city of Baltimore, and in excavating for the foundation it should become necessary to use large quantities of dynamite in blasting. Could it be insisted with any reason that the employees of the Government engaged in that work could not be required to keep this dynamite stored, and to handle the same and do the blasting in accordance with the municipal or state regulations controlling such work? And if, in order to guard against accidental explosions the local regulations should require that the foreman who had the supervision of work of that character should satisfy the authorities that he possessed proper knowledge and skill, and that he should obtain a license showing that fact, such a regulation would clearly be valid and enforceable against him who should undertake to supervise the work for the Government.

The distinction between the power to adopt and enforce a police regulation and the power to levy a tax is illustrated by the cases of *New York v. Miln* (11 Pet. 102, 112) and *Henderson v. Mayor of New York* (92 U. S. 259).

In the former case the Supreme Court of the United States had under consideration the validity of a statute of the State of New York which required, among other things, that every master or commander of any ship or vessel arriving in the port of New York from any country out of the United States, or from any of the other States other than New York, should, within twenty-four hours after the arrival of such ship or vessel, make a report in writing on oath or affirmation to the mayor of the city of New York, or, in his absence, to the recorder of said city, of the name, place of birth, and last legal settlement, age and occupation, of every person brought as a passenger in said ship or vessel on her last voyage; and of all passengers landed, or suffered or permitted to land, from such ship or vessel at any place during such voyage, or put on board, or suffered or permitted to go on board the vessel with the intention of proceeding to said city, under a penalty, in case of failure to comply therewith, of \$75 for every person so neglected to be reported. It was insisted that this statute was an unlawful interference with commerce, and hence unconstitutional; but the court maintained its validity on the ground that it was enacted to guard the State of New York against undesirable immigrants, and was designed to promote the public welfare, and was, therefore, a reasonable police regulation.

In *Henderson v. Mayor of New York* the statute under consideration required that every master of a vessel arriving at the port of New York from a foreign port should, within twenty-four hours after arrival, report in writing to the mayor of the city the name, birthplace, last residence, and occupation of every passenger not a citizen of the United States, and directed that the mayor require the owner or consignee of the vessel to give a bond for every passenger so reported in a penalty of \$300, with two sureties, each to be a resident and freeholder of the State, conditioned to indemnify the commissioners of immi-

gration and every county, city, and town in the State against any expense for the relief or support of the person named in the bond for four years thereafter; but that the owner or consignee might be relieved from giving the bond by paying for each passenger, within twenty-four hours after his landing, \$1.50. The court held that this act was invalid, because the requirement that the master report the passengers on board the vessel was only a subterfuge, and the real purpose of the act was to impose and collect a tax of \$1.50 on each passenger.

There appears to be a consensus of opinion that, on account of the power of motor vehicles, and the speed at which they may be driven, which endangers the safety of pedestrians, and their appearance, and the noise which is ordinarily incident to their movements, which tends to frighten animals ridden or driven along the road, it is legitimate and proper for legislative bodies to enact strict rules and regulations governing their operation.

Consequently, I am of the opinion that the validity of the laws of Maryland and Virginia, as applied to automobiles and the chauffeurs in charge of the same in the service of the President, must turn upon whether the license fees provided for by those laws are a tax upon the vehicles and upon the privilege of operating them under the employment of the Government, or are fees merely intended to pay the expenses of complying with the preliminary requirements for operating those automobiles in those States.

So far as applicable to this question, the provisions of the two statutes are substantially the same, and it will be necessary only to state the material provisions of the Maryland act, which are contained in sections 131 to 140 of article 56 of the code of 1904, as amended by an act passed by the general assembly of Maryland in 1910.

By section 133 every owner, before operating an automobile in the State, is required to file with the commissioner of motor vehicles an application for the registration of such vehicle; and upon the payment of the prescribed fee the commissioner is authorized to issue to the owner a certifi-

cate of registration in the form prescribed, which certificate shall at all times be carried upon the motor vehicle and shall be subject to examination upon demand by any proper officer. The commissioner is also required to furnish the owner with two duplicate metal plates or markers bearing the letters "Md", and a number or mark assigned to such vehicle, the figures thereof to be not less than a designated size.

By section 136 the fees for class A vehicles are fixed at \$6 per annum for each motor vehicle with a rating of 20 horsepower or less, \$12 per annum for one with a rating of more than 20 and not more than 40 horsepower, and \$18 per annum for one with a rating of more than 40 horsepower.

By section 137 it is provided that no person shall operate a motor vehicle upon any highway of the State until he first shall have obtained an operator's license for that purpose, and no license to operate an automobile is to be issued to any person under the age of 16 years; the fee for such license being fixed by section 138 at \$2.

By section 139 provision is made for the suspension or revocation of operators' licenses upon a hearing by the commissioner of motor vehicles.

By section 140 it is required that every motor vehicle, except motor cycles, shall at all times while being operated have displayed, entirely unobscured and kept reasonably clean, the number plate or marker issued by the commissioner, one of such plates being displayed on the front and the other on the rear of the vehicle.

Subsequent provisions contain minute regulations with reference to the speed of motor vehicles; when the speed shall be reduced, and when the vehicle shall be stopped; what shall be done in case of accident; what persons are forbidden to operate vehicles; the use of brakes, bells, horns, and other devices for giving warning, and lights; against allowing vehicles to stand unattended, and for the imposition of penalties in case of violation of the act; and in section 140r it is provided that all moneys collected by the commissioner of motor vehicles pursuant to the pro-

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visions of the statute, except such as shall be necessary for his salary and the expenses of his office, shall be accounted for and remitted by said commissioner to the state treasurer, who shall create a special fund thereof, and on the 1st day of April of each year one-fifth thereof shall be paid to the mayor and city council of Baltimore for use on its roads and streets, and the balance to be used for the oiling, maintenance, and repair of the roads now being built by the State and counties and for no other purpose, and that the remainder shall be expended on roads in the manner prescribed.

By section 140t certain public vehicles are exempted, among which are not included vehicles belonging to the United States Government.

It is apparent from a reading of this act that it was passed primarily as a police regulation, the purpose being to permit none but experienced and cautious persons to operate motor vehicles, and to exact of them proper care and caution in their operation, by prescribing minutely the permissible rate of speed, under what circumstances the speed shall be reduced or the vehicle stopped, upon what side of the road they shall move, and such other requirements as the legislature deemed necessary to promote the safety of the public, and at the same time permit the public highways to be used by vehicles of this character.

It is equally apparent, however, that the provision with reference to the amount of fees that shall be charged for licenses is a tax upon the vehicles. This is clearly shown by the fact that different fees are charged for the operation of vehicles of different horsepower, and that the revenue derived therefrom, as well as from the penalties imposed for violation of the act, is set aside for the special purpose of the improvement of roads. The fact that this is denominated a license fee does not relieve it from the objection that it is in fact a tax upon the vehicle.

The cases bearing upon this question are all reviewed by the court speaking through Mr. Justice Harlan in the late case of *Western Union Telegraph Co. v. Kansas* (216 U. S. 1),

where it was held that an act of the State of Kansas which required every corporation of another State, before transacting business in Kansas, to pay into the state treasury a charter fee of one-tenth of 1 per cent of its authorized capital, upon the first \$100,000 of its capital stock or any part thereof, and upon the next \$400,000 or any part thereof, one-twentieth of 1 per cent; and for each million or major part thereof over and above the sum of \$500,000, \$200, was unconstitutional because it was a burden upon interstate commerce, and because it was a tax upon the company's property lying outside the State of Kansas, and was, therefore, a taking of its property without due process of law.

I am of the opinion, therefore, that the payment of this license fee can not be exacted; but that the State has the power to enforce, as to these automobiles and the chauffeurs operating the same, all the provisions of the act which look to the conservation of the public safety.

Undoubtedly, the state officials who are intrusted with the issuance of licenses can not be required to do their prescribed work without compensation, and I think a reasonable fee for their services could be exacted for issuing the licenses, both to the chauffeur and for operating the automobiles.

In the foregoing discussion I have not taken into consideration the effect of Congressional legislation under the commerce clause of the Constitution, regulating the operation of automobiles on trips extending from the District of Columbia into a State, or from one State into another, as Congress has as yet passed no legislation upon that subject.

Respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

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PURCHASE OF SUPPLIES NOT LISTED—PUBLIC PRINTER.

In purchasing articles of supplies not listed in the schedule of the general supply committee, or contracted for by the Secretary of the Treasury, the head of a department making the requisition is not required to state the specific reasons why such articles are necessary in lieu of other articles of a more or less similar nature which are listed on the schedule. Nor is the head of a department required to submit a similar statement in making a requisition upon the Public Printer for an article within the description of articles enumerated in the act of June 28, 1902 (32 Stat. 481), but which is not required to be made to order, or "done," at the Government Printing Office under the provisions of section 87 of the act of January 12, 1895 (28 Stat. 622).

The discretion to be exercised by the Public Printer under section 87 of the act of January 12, 1895, extends only to articles of a character which are to be "done," that is, "executed, manufactured, or made," at the Government Printing Office.

The fact that a similar article is listed upon the general supply committee's schedule authorized by section 4 of the act of June 17, 1910 (36 Stat. 531), which might possibly subserve the purpose desired, is a matter that concerns only the head of the department making the requisition.

DEPARTMENT OF JUSTICE,
February 15, 1911.

SIR: I beg to acknowledge the receipt of your letter of the 13th instant, reading as follows:

"This department being in need of a device for holding, locking, and filing together loose record sheets of uniform size, after due investigation, decided to procure, as being best adapted to its needs, two Proudfit Key Lock Binders, a complete patented device designed to serve the purpose indicated; and desiring to utilize its allotment for printing and binding to cover the cost thereof, made a requisition upon the Public Printer for the binders in question, in accordance with the act of June 28, 1902 (32 Stat. 481). Action upon this requisition has been withheld by the Public Printer pending the receipt of a 'certificate setting forth specifically the reasons why the binders of the style asked for * * * are necessary in lieu of the standard styles provided under the general supply committee's schedule,' basing the request for such a certificate upon section 4 of the act of June 17, 1910, and section 51 of the public printing act of January 12, 1895 (28 Stat. 608). The particular binders for which requisition was made are not listed on the general supply committee's schedule of

articles contracted for by the Secretary of the Treasury pursuant to the provisions of section 4 of the act of June 17, 1910, although a more or less similar device known as the 'Kalamazoo Loose Leaf Binder' is so listed. The position taken by the Public Printer is understood to be that he is authorized to furnish, or to decline to furnish, upon the requisition of the head of a department, the complete patented devices with which to file uniform official papers mentioned in the act of June 28, 1902, according as he approves or disapproves the form or style of the patented device requested, and to make his approval contingent upon a similar device being listed on the general supply committee's schedule, in the absence of a certificate setting forth specifically the reasons why the patented device asked for is necessary, in lieu of any similar device so listed. The Public Printer was informed that, as the department had been advised, he was authorized to furnish the binders asked for and to charge them to the department's allotment for printing, irrespective of any certificate or statement other than the requisition therefor, and that he was not required to demand, nor was the Secretary of Commerce and Labor required to give, the specific reasons which led to the requisition in question; and he was requested to state whether he still desired that specific reasons be assigned for specifying the particular binder called for in its requisition. In reply the Public Printer stated that such was still his desire, and inclosed a copy of your opinion to the President of January 26, 1911 (*ante*, p. 581), in support of his position:

"After a careful reading of your opinion, however, the department is in doubt as to whether the Public Printer has correctly applied it in the present instance, and as to whether, properly understood, the opinion holds that the Public Printer may lawfully require the head of a department to accompany any requisition made by him for an article enumerated in the act of June 28, 1902, with a statement of the specific reasons on which the requisition is based, either on the ground that articles similar to the one called for are listed on the general supply committee's schedule, or on the ground that the Public Printer is

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authorized by section 51 of the act of January 12, 1895, to determine the forms and style in which the 'printing or binding' ordered by any of the departments shall be 'executed.'

"In the view of the department, the question has seemed of some importance, by reason of the fact that if the department can not use its allotment for printing in the purchase of articles of the character described in the act of June 28, 1902, where articles of a similar description are listed on the general supply committee's schedule. without furnishing reasons satisfactory to the Public Printer that such articles are necessary, the department can not utilize any of its appropriations in the purchase of needed articles or supplies not listed on the schedules mentioned without satisfying some other official of the Government of the sufficiency of its reasons for so doing.

"Referring to the article desired in the present instance, it should be noted that it is one which it is not necessary to have specially executed, manufactured, or made. It is a complete patented device, and, as such, usually carried in stock in commercial houses. Being a patented device, it is assumed that the Government Printing Office could not make it.

"Under the circumstances, therefore, I have the honor to inquire whether, in purchasing articles of supplies not listed on the schedule of the general supply committee, or contracted for by the Secretary of the Treasury, I am required to state the specific reasons why such articles are necessary in lieu of other articles of a more or less similar nature which are listed on the schedule mentioned, and whether, in making a requisition upon the Public Printer for any such article which may be within the description of articles enumerated in the act of June 28, 1902, I am required to furnish a similar statement, notwithstanding the fact that the article desired is not one required to be made to order or 'done' at the Government Printing Office."

Section 87 of the act of January 12, 1895 (28 Stat. 601, 622), provides:

"SEC. 87. All printing, binding, and blank books for the Senate or House of Representatives and for the Executive

and Judicial Departments shall be done at the Government Printing Office, except in cases otherwise provided by law."

Section 51 of the same act provides:

"SEC. 51. The forms and style in which the printing or binding ordered by any of the Departments shall be executed, and the material and the size of type to be used, shall be determined by the Public Printer, having proper regard to economy, workmanship, and the purposes for which the work is needed."

Section 1 of the act of June 28, 1902 (32 Stat. 481), provides:

"The Public Printer is authorized hereafter to procure and supply, on the requisition of the head of any Executive Department or other Government establishment, complete manifold blanks, books, and forms, required in duplicating processes; also complete patented devices with which to file money-order statements, or other uniform official papers, and to charge such supplies to the allotment for printing and binding of the Department or Government establishment requiring the same."

In my opinion of January 26, 1911 (*ante*, p. 581), upon which the Public Printer relies in support of his position in the case, it was said:

"Section 1 of the act of June 28, 1902 (32 Stat. 481), quoted in the letter of the Public Printer, merely authorizes the Public Printer, on the requisition of the head of any executive department or other government establishment, to procure and supply the articles therein referred to. This provision must be construed in the light of section 51 of the act of January 12, 1895, which provides that 'the forms and style in which the printing or binding ordered by any of the departments shall be executed, and the material and the size of type to be used, shall be determined by the Public Printer, having proper regard to economy, workmanship, and the purposes for which the work is needed.' *If the article referred to in this question is of the character required by section 87 of the act of January 12, 1895, to be 'done' at the Government Printing Office, as that section has hereinbefore been interpreted, I think the Public Printer is vested by the act of January 12, 1895, with such discretion as to how the work shall be executed as to pre-*

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clude the idea that there is any peremptory duty resting upon him under the act of June 28, 1902, 'to supply a specifically described patented binding device on the requisition of an allottee of the appropriation for public printing and binding when, in the Public Printer's discretion, an article of different character is more in the interest of economy, uniformity, and better adapted to the needs of the service.' "

Previously in that opinion it had been held with respect to section 87 of the act of January 12, 1895, that "it only requires 'printing, binding, and blank books' which it is necessary to have specially executed, manufactured, or made, to be 'done' at the Government Printing Office, except in cases otherwise provided by law."

It is manifest from this and the express language of the paragraph of that opinion above quoted that the discretion held to be possessed by the Public Printer in respect to the purchase of articles authorized by section 1 of the act of June 28, 1902, was dependent upon such articles, or any of them, being "of the character required by section 87 of the act of January 12, 1895, to be 'done' at the Government Printing Office;" that is, "executed, manufactured, or made" there. If the articles referred to in that section, or any of them, are not such as the Public Printer may more economically manufacture or make, but must necessarily be purchased by him in order to fill a requisition by a particular department, there is nothing calling for the exercise of the discretion reposed in him by section 51 of the act of January 12, 1895, and he must purchase as directed in the requisition. The fact that a similar article is listed upon the general supply committee's schedule authorized by section 4 of the act of June 17, 1910, which might possibly subserve the purpose desired, is a matter which concerns only the head of the department making the requisition.

I have the honor, therefore, to answer your inquiries in the negative.

Respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF COMMERCE AND LABOR.

DISCONTINUANCE OF PENSION AGENCIES.

The President is not authorized to discontinue seventeen of the eighteen agencies for the payment of federal pensions, and direct that work now divided among the eighteen to be performed by one agency. His power to reduce or consolidate such agencies is limited by the act of March 3, 1891 (26 Stat. 1082), to the reduction or consolidation of such agencies with the three groups directed to be established by that act.

DEPARTMENT OF JUSTICE,

February 20, 1911.

SIR: I beg to acknowledge the receipt of your letter of the 4th instant requesting my opinion upon the following question:

"Has the President, acting under the provisions of Revised Statutes, section 4780, power to discontinue 17 of the 18 agencies for the payment of Federal pensions and to direct that the work now divided among the 18 be performed by one agency, if he deems that course expedient, or has that power been modified, withdrawn, or limited by subsequent legislation?"

Section 4780 of the Revised Statutes provides:

"SEC. 4780. The President is authorized to establish agencies for the payment of pensions wherever, in his judgment, the public interests and the convenience of the pensioners require; but the number of pension agencies in any State or Territory shall in no case be increased hereafter so as to exceed three, and no such agency shall be established in addition to those now existing in any State or Territory in which the whole amount of pensions paid during the fiscal year next preceding shall not have exceeded the sum of five hundred thousand dollars."

The authority of the President under the then existing law to consolidate two or more such agencies into one was affirmed by Attorneys-General Williams and Devens, in opinions rendered December 6, 1872, and May 3, 1877, respectively. (14 Op. 147; 15 *ib.* 246.)

In the latter opinion it was held that the authority of the President to discontinue existing pension agencies, arising out of the power to establish them conferred by the act of February 5, 1867, which was the original of section 4780 of the Revised Statutes, was not affected by the tenure of

office acts of March 2, 1867 (14 Stat. 430), and April 5, 1869 (16 Stat. 6), which deprived him of power to remove such officers. The effect of a discontinuance of such an agency it was held would, notwithstanding the tenure of office acts, discontinue the official relation of the agent with the Government.

This matter is now relieved of any such complication by the repeal of the tenure of office acts, which, it has been held, restored to the President his power to remove an officer appointed, by and with the advice and consent of the Senate, for a term of years, in his discretion, for the public good. (*Parsons v. United States*, 167 U. S. 324.)

It is necessary to consider the legislation passed since the opinions referred to were rendered affecting this subject.

By the act of March 3, 1891, chap. 548 (26 Stat. 1082), Congress provided:

"SEC. 2. That the Secretary of the Interior is hereby authorized and directed to arrange the various agencies for the payment of pensions in three groups as he may think proper, and may from time to time change any agency from one group to another as he may deem convenient for the transaction of the public business. The first group shall make their quarterly payments of pensions on January fourth, April fourth, July fourth, and October fourth of each year; the second group shall make their quarterly payments of pensions on February fourth, May fourth, August fourth, and November fourth of each year; and the third group shall make their quarterly payments of pensions on March fourth, June fourth, September fourth, and December fourth of each year. The Secretary of the Interior is hereby fully authorized to cause payments of pensions to be made for the fractional parts of quarters created by such change, so as to properly adjust all payments as herein provided. Section forty-seven hundred and sixty-four of the Revised Statutes is hereby so amended as to conform to the changes in the time of payments provided herein, and is made applicable thereto.

"The sum of fifteen thousand dollars is hereby appropriated to meet the expenses involved in carrying into effect the changes herein provided for."

Section 4764 of the Revised Statutes provided:

"SEC. 4764. Within fifteen days immediately preceding the fourth day of March, June, September, and December in each year, the several agents for the payment of pensions shall prepare a quarterly voucher for every person whose pension is payable at his agency, and transmit the same by mail, directed to the address of the pensioner named in such voucher, who, on or after the fourth day of March, June, September, and December next succeeding the date of such voucher, may execute and return the same to the agency at which it was prepared, and at which the pension of such person is due and payable."

The act of March 4, 1907, chapter 2920 (34 Stat. 1407), provided:

"For salaries of eighteen agents for the payment of pensions, at four thousand dollars each, seventy-two thousand dollars.

"Provided, That the Secretary of the Interior shall make inquiry and report to Congress at the beginning of its next regular session the effect of a reduction of the present pension agencies to one such agency upon the economic execution of the pension laws, the prompt and efficient payment of pensioners, and the inconvenience to pensioners, if any, which would result from such reduction. This provision shall not be construed as interfering with or limiting the right or power of the President under existing law in respect to reduction or consolidation of existing pension agencies.

"For clerk, hire and other services, in the pension agencies, four hundred and thirty-five thousand dollars: *Provided, That the amount of clerk hire, and other services, for each agency, shall be apportioned as nearly as practicable in proportion to the number of pensioners paid at each agency and the salaries paid shall be subject to the approval of the Secretary of the Interior.*

"For rent, New York agency, four thousand five hundred dollars.

"For examination and inspection of pension agencies, as provided by the final provision of the act of August eighth, eighteen hundred and eighty-two, amending section forty-

seven hundred and sixty-six, Revised Statutes, one thousand five hundred dollars.

"For stationery and other necessary expenses, thirty thousand dollars."

The purpose of section 2 of the act of March 3, 1891, was thus stated when that provision was under consideration in the Senate as an amendment to the pending pension appropriation bill (22 Cong. Rec., 2175):

"Mr. ALLISON. The Secretary of the Interior and the Secretary of the Treasury unite in recommending that the amount of money paid for pensions should go out of the Treasury monthly, rather than quarterly, and they recommend this adjustment, so that every month the amount of pensions for that month will be paid, although the pensioner will receive his money quarterly. The object of this section is to divide the pension agencies into groups, so that one-fourth of them will pay pensioners one month, one-fourth the next, and so on. It is regarded as a matter of importance to the Treasury in view of the large amount now paid for pensions. There will be an accumulation under existing law of some thirty-five millions of money each quarter. Under this arrangement there will be no accumulation, but the money will go out of the Treasury every month. It will not interfere in any way with the pensioners and will be a great convenience to the Treasury. The pensioner will still receive his money quarterly; and, in order to make it exactly just, fractional payments are authorized."

In view of the act of Congress of March 3, 1891, directing the division of the existing pension agencies into three groups and specifying the manner in which they should make their quarterly payments of pensions, the question naturally arises whether the President could thereafter consolidate such agencies into one, and whether, if he still possessed any authority to consolidate or reduce existing agencies, he was not necessarily confined by this legislation, in making any reductions or consolidation, to the maintenance of the three divisions provided for by the act of March 3, 1891. That act manifestly proceeds upon the assumption that the existing number of agencies will be main-

tained, and while the power of the President to reduce the existing number of agencies, by consolidation or otherwise, which had previously been asserted, is not expressly impaired, it would seem that in the exercise of such power he would necessarily have to conform to any expression of the legislative will on the subject.

There would be little doubt in my mind on this subject were it not for the act of March 4, 1907. That act, while directing the Secretary of the Interior to make inquiry and report to Congress as to the effect of a reduction of the present pension agencies to one such agency upon the economic execution of the pension laws and the prompt and efficient payment of pensioners, as well as in respect to the inconvenience to pensioners, if any, which would result from such reduction, expressly provides that "this provision shall not be construed as interfering with or limiting the right or power of the President under existing law in respect to the reduction or consolidation of existing pension agencies." This proviso, while not conferring any additional power upon the President, I think may fairly be said to amount to a recognition of his authority, under existing law, to reduce or consolidate the existing pension agencies. But, in my judgment, it does not enlarge or diminish that power. It simply leaves it where it was, and at that time it was modified by the Act of March 3, 1891.

Nor do I regard the language of the recent appropriation acts as enlarging the power of the President in the premises. Those acts provide (acts of May 28, 1908, 35 Stat. 419; March 4, 1909, 35 Stat. 1058, and June 25, 1910, 36 Stat. 843):

"For salaries of agents for the payment of pensions, at \$4,000 each, \$72,000, or so much thereof as may be necessary."

The phrase, "or so much thereof as may be necessary," like the proviso to the act of March 4, 1907, may be said to imply authority in the Executive to reduce the number of agents, but can not, I think, properly be held to remove the limitation imposed by the act of March 3, 1891, as to the maintenance of the three groups of agencies for the purpose of making payments as therein directed.

I have therefore to advise you that, in my opinion, the President is not authorized to discontinue 17 of the 18 agencies for the payment of Federal pensions, and direct that work now divided among the 18 to be performed by 1 agency, but that his power to reduce or consolidate such agencies is limited by the act of March 3, 1891, to the reduction or consolidation of such agencies with the three groups directed to be established by that act.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF THE INTERIOR.

COURT-MARTIAL—CENSURE FOR MISCONDUCT NOT A BAR.

Disapproval of conduct and censure by the Secretary of the Navy of a subordinate officer for misconduct is not such a reprimand, contemplated by section 265 of the Navy Regulations, as will prevent a court-martial proceeding upon the same charge.

The reprimand referred to in section 265 of the Navy Regulations is such a reprimand as is administered under the authority of the statutes enacted and regulations adopted for the control of the Navy.

DEPARTMENT OF JUSTICE,

February 27, 1911.

SIR: I have the honor to acknowledge receipt of your communication of December 31, 1910, relating to the case of A. H. Robnett, passed assistant surgeon, U. S. Navy, in which you inquire whether the reprimand made by the Secretary of the Navy on a charge of misconduct was such a trial and punishment as to prevent a court-martial proceeding upon the same charge.

The facts, briefly stated, are as follows:

On December 13, 1909, Medical Inspector Howard, E. Ames, U. S. Navy, in command of the United States Naval Hospital at Chelsea, Mass., addressed a letter to the commandant of the navy-yard, Boston, in which he made a detailed statement of certain conduct on the part of Doctor Robnett denominated as scandalous, and stamped his action as unbecoming an officer and a gentleman. This

letter, with a reply by Doctor Robnett, was transmitted by the commandant to the Secretary of the Navy, and, after stating the facts as ascertained by him, the commandant recommended that, for the reasons assigned, "Passed Assistant Surgeon Robnett be detached from this station and ordered to other duty, and that he also be admonished as to the conduct of which he has been guilty." On December 30, 1909, the Secretary of the Navy addressed a letter to Doctor Robnett, in which, after detailing the facts relating to his conduct as reported, he said:

"Such conduct merits and receives the disapproval and censure of the department, and your trial by general court-martial would be seriously considered were it not probable that the notoriety of such trial would be more unfortunate for the good name of the Navy than would be the benefit of the sentence the court might award you for such conduct. You will acknowledge receipt of this communication, a copy of which will be placed with your record, and the incident will be considered closed."

It is asserted on behalf of Doctor Robnett that the Secretary, in pursuance of the suggestion of the commandant of the Boston Navy-Yard, also detached him from that station and ordered him to duty elsewhere, but there is nothing in the record to show that this was done pursuant to such recommendation, and if it were, such fact would not change my conclusion as to the legal effect of the action taken by the Secretary.

On January 4, 1910, the Navy Department, at the instance of Doctor Ames, ordered a general court-martial of Doctor Robnett on the charge of conduct unbecoming an officer and a gentleman, the specifications thereunder embodying the allegations made in Doctor Ames's letter to the commandant of the Boston Navy-Yard. Counsel for the accused presented a plea in bar, in which was set up as a defense the action of the Secretary of the Navy in reprimanding Doctor Robnett in the language above quoted and in the manner stated, it being insisted that such reprimand was an adjudication of the matters in question and barred the infliction of any other punishment therefor; and

counsel especially relied, and now rely, upon that part of section 265 of the Navy Regulations, which reads as follows:

“* * * And no officer who has been formally reprimanded for an offense shall be subsequently tried therefor, nor shall that offense be the subject again of inquiry, except when it may be indispensable to prove a particular habit charged; a private reprimand, however, is no bar to subsequent investigation and trial.”

The question is whether or not this contention of counsel is well founded.

I am of the opinion that it is not, and that the action of the Secretary of the Navy was not such a reprimand as is contemplated by said section 265.

By section 1624, Revised Statutes, it is provided that “The Navy of the United States shall be governed by the following articles:” and then follow sixty articles which specify in detail, among other things, what offenses are punishable, and the punishments that shall be inflicted therefor, and how sentences may be imposed.

Article 4 provides that—

“The punishment of death, *or such other punishment as a court-martial may adjudge*, may be inflicted on any person in the naval service” for the commission of either of the twenty offenses mentioned therein.

Article 8 provides that—

“Such punishment *as a court-martial may adjudge* may be inflicted on any person in the Navy” who is guilty of profane swearing, falsehood, etc., “*or any other scandalous conduct tending to the destruction of good morals*,” or of either of the other twenty-two offenses mentioned therein.

By article 14 it is provided that—

“Fine and imprisonment, or such other punishment *as a court-martial may adjudge*, shall be inflicted upon any person in the naval service of the United States” who shall commit either of the offenses of fraud against the United States therein mentioned.

Article 20 provides that every commanding officer of a vessel in the Navy shall obey the rules set out therein, and that every officer offending against such provisions shall be punished “*as a court-martial may direct*.”

Article 22 reads:

"All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished *as a court-martial may direct.*"

By article 24 it is provided that—

"No commander of a vessel shall inflict upon a commissioned or warrant officer any other punishment than *private reprimand*, suspension from duty, arrest, or confinement * * * nor shall he inflict, or cause to be inflicted * * * for a single offense, or, at any one time, any other than one" of the punishments named therein.

By section 257 of the Navy Regulations it is provided that punishment shall be in strict conformity with the laws for the government of the Navy; and the material parts of section 265 read as above quoted.

It thus appears that by the statutes and Navy Regulations, there was adopted a comprehensive and complete system of laws for the accusation, trial, and punishment for offenses committed by officers and seamen; and by the express language of those statutes and regulations, a reprimand may be administered for certain minor offenses by the commander of a vessel, or, for those and other offenses, by direction of a court-martial; but there is no provision therein for a reprimand by the Secretary of the Navy, nor is there any expression indicating that when such reprimand is administered by the Secretary, it shall be considered as a punishment within the meaning of those regulations.

It is my opinion that the reprimand referred to in section 265 is such a reprimand as may be administered under the authority of the statutes enacted and regulations adopted for the control of the Navy, and none other. No doubt the Secretary of the Navy may, within his discretion, when he believes it for the good of the service, send communications to subordinate officers which may be in the nature of a reprimand. This right is necessarily vested in him as the chief officer of that department; but such communications can not be regarded in the nature of a punishment as defined in the regulations.

Regardless of whether a proceeding under the Navy Regulations constitutes a jeopardy within the meaning of the fifth amendment to the Constitution, it is apparent that the proceedings above detailed can not be regarded as a jeopardy. While Doctor Ames, in his communication to the commandant of the Boston Navy-Yard, detailed particularly the facts upon which his accusation was based, yet there was never anything more than a private investigation of the matter by the commandant, and a report thereon to the Secretary of the Navy.

Respectfully,

GEORGE W. WICKERSHAM.

THE PRESIDENT.

STEAMER "JOHN B. KETCHAM 2ND"—REMOVAL FROM CHANNEL.

Where a steamer (the *John B. Ketcham 2nd*) ran into a bank at the entrance to the West Neebish channel, and swung around, sinking in the middle of the channel, so as to completely obstruct navigation between the Lakes Superior and Huron, and the engineer officer of the Government thereupon took immediate possession of the vessel under section 20 of the river and harbor act of March 3, 1899 (30 Stat. 1154), and employed a wrecking company to swing it from the channel, said vessel, upon the failure of the owners thereof to pay for this service, may be regarded as having been abandoned and forfeited to the United States.

The subsequent action of the wrecking company in raising the vessel and removing it from the jurisdiction of the United States, and in refusing to turn it over to the War Department, thus placing it beyond the power of the United States to enforce its lien, may not relieve the Government of its responsibility to that company for the expense incurred by it in removing the vessel from the channel, but it would seem to justify the Government in refusing to pay such claim unless the vessel is brought within the jurisdiction of the United States, so that it may be attached and sold for the benefit of all claimants, including the United States, according to their respective rights and priorities.

The liens acquired by the wrecking company upon the vessel, by virtue of the services rendered by it in raising the vessel and towing it into port, are superior to that which the United States would have if it paid the company for removing the vessel from the channel.

The authority of the Secretary of War under section 20 of the act of March 3, 1899 (30 Stat. 1154), to pay the claims of the wrecking company, other than for the expenses incurred in removing the vessel from the channel, doubted.

DEPARTMENT OF JUSTICE,

February 28, 1911.

SIR: I have the honor to reply to your letter of the 17th ultimo, reading as follows:

"The steamer *John B. Ketcham 2nd*, during a fog, ran into a bank at the entrance to the West Neebish channel, and swung around, sinking in the middle of the channel, so as to completely obstruct navigation between Lakes Superior and Huron. As the need of immediate relief to navigation was imperative, the local engineer officer (Col. Curtis McD. Townsend), upon being notified of the condition of affairs, took immediate possession of the vessel under section 20 of the river and harbor act of March 3, 1899 (30 Stat. 1154), and employed the Reed Wrecking Company to swing the vessel free from the channel, which company submitted a bill to the owners, through the local engineer officer, of \$18,000 for this service. Upon the completion of this work, the said company raised the vessel for the owners and took it to Port Huron, Mich., a distance of several hundred miles, charging \$12,000 for this additional service. An estimate of cost of \$14,000 for repairing the vessel has been submitted—the cost of removing the sunken vessel from the channel, raising it, and repairing it thus aggregates \$44,000. The value of the vessel is understood to exceed the aggregate amount of these several claims.

"The wrecking company, a Canadian concern, has taken the vessel to Canada, and holds the same as security for the payment of the \$12,000 charged for the completion of raising the vessel and taking it to Port Huron. The company demands payment of the \$18,000 charged for removing the vessel from the channel, but has been notified that the Government will not pay this amount unless the vessel is turned over to the United States. The company has ignored this notice.

"It is claimed by the owners that the Government should assume the liability of \$18,000; that this amount is unreasonable and was expended simply in clearing the channel; that the expenditure was of no benefit to the owners, but that, on the contrary, the vessel was damaged in the

process to the extent of \$7,000 by the action of the wrecking company employed by the Government to swing the vessel out of the channel in not sufficiently releasing the boat from the rocky bottom of the channel; and that the statute under which the Government makes claim for the amount expended in clearing the channel is unconstitutional, for the reason that it provides that in case the boat shall be sold under circumstances like those of the case under consideration, the whole proceeds shall be turned over to the Government, regardless of whether the same may exceed the amount necessary to reimburse the Government."

Upon this state of facts you request my opinion on the following questions:

"1. Whether or not the provision that the whole proceeds shall be turned over to the Government, regardless of the amount necessary to reimburse the United States, is unconstitutional; and, if so, whether the unconstitutionality of this provision renders the lien created by the statute for the expense of removing the vessel from the channel also unconstitutional, or whether the lien can be severed from the objectionable provision and enforced by suit against the vessel.

"2. Whether or not the Secretary of War, if the lien be regarded as unconstitutional, has power to waive the claim of \$18,000 against the boat.

"3. Whether, in view of the fact that the Reed Wrecking Company has removed the vessel from the jurisdiction of the United States, and has refused to turn her over to this department, thus putting it beyond the power of the United States to enforce its lien and, in effect, destroying the security of the United States, the Government is relieved of responsibility to the company.

"4. Whether or not, in view of the other claims against the vessel, the department has authority to pay the claims of the Reed Wrecking Company and thus secure the boat so that suit can be brought against the vessel to enforce the lien for the amounts so paid."

The law respecting the removal of sunken vessels and other similar obstructions from the navigable waters of

the United States is contained in sections 19 and 20 of the river and harbor act of March 3, 1899, chap. 425 (30 Stat. 1154). Those sections provide:

"SEC. 19. That whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of War at his discretion, without liability for any damage to the owners of the same: *Provided*, That in his discretion, the Secretary of War may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also*, That the Secretary of War may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: *Provided*, That such bidder shall give satisfactory security to execute the work: *Provided further*, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph, shall be covered into the Treasury of the United States.

"SEC. 20. That under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section nineteen, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of War, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of War or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided*, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: *And provided further*, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States.

"Such sum of money as may be necessary to execute this section and the preceding section of this Act is hereby appropriated out of any money in the Treasury not otherwise appropriated, to be paid out on the requisition of the Secretary of War."

The proceedings by the engineer officer of the Government in respect to the steamer *John B. Ketcham 2nd* were had under section 20.

It seems unnecessary to answer your first question—as to the constitutionality of the provision of this section that the whole proceeds of the sale of a craft, or any part thereof that may not be destroyed in removal, shall be

covered into the Treasury, regardless of the amount necessary to reimburse the United States. This is so, because the present case, as will hereafter appear, does not seem to require any such action. I may say, however, that I have no doubt on the subject. The power of Congress, in view of its paramount authority over the navigable waters of the United States, to authorize the removal of a sunken vessel from any such waters, in the case of an emergency, as provided in that section, would seem to be unquestionable. This being so, its power to make the expense of removing any such obstruction a charge against the craft and cargo, and upon failure or refusal of the owners to reimburse the United States for such expense, within a reasonable time after notice, to direct that the vessel or cargo, or any part thereof not destroyed in removal, be sold and the proceeds of such sale covered into the Treasury, would seem to be equally clear. Under such conditions, the vessel may well be regarded as having been abandoned by the owners and forfeited to the United States.

Your second question—whether the Secretary of War has power to waive the claim of \$18,000 against the vessel—being based upon the hypothesis that the charge imposed by section 20 is to be regarded as unconstitutional, requires no answer.

Your third question can not be answered categorically. The fact that the Reed Wrecking Company has removed the vessel from the jurisdiction of the United States and has refused to turn it over to your department, thus, as you say, putting it beyond the power of the United States to enforce its lien, and in effect destroying the security of the United States, while it may not relieve the Government of responsibility to that company for the expense incurred by it, at the request of the Government, in removing the vessel from the channel, would seem to justify the Government in refusing to pay such claim unless the vessel is brought within our jurisdiction, so that it may be attached and sold for the benefit of all claimants according to their respective rights and priorities.

It seems clear that the liens acquired by the wrecking company upon the vessel, by virtue of the services rendered

by it in raising the vessel and towing it into port, are superior to that which the United States would have if it paid the company for removing the vessel from the channel.

As stated in *The Thomas Morgan* (123 Fed. 781, 787), referring to the relative rank of maritime liens:

" * * * The rule as to priority which prevails in courts of law, and which is expressed in the maxim, '*Qui prior est tempore, potior est jure*,' has no application. The converse is often the rule, for liens which are in the nature of rewards for benefits done, generally rank against the fund in the inverse order of their attachment on the res, for the thing which is the subject of all the liens ought to pay first those who in the highest degree have contributed to its safety and preservation."

So it is held that "bottomry bonds take priority in the inverse order of their execution." (36 Cyc. 201, and authorities cited.)

In *The J. E. Rumbell* (148 U. S. 1, 9), it was said:

"By the admiralty law, maritime liens or privileges for necessary advances made, or supplies furnished, to keep a vessel fit for sea, take precedence of all prior claims upon her, unless for seamen's wages or salvage. It is upon this ground, that such advances or supplies, made or furnished in good faith to the master in a foreign port, are preferred to a prior mortgage or to a forfeiture to the United States for a precedent violation of the navigation laws." (*The St. Jago de Cuba*, 9 Wheat. 409, 416; *The Emily Souder*, 17 Wall. 666, 672.)

In the present case if the Government, instead of turning the vessel over to the owners after it had been swung out of the channel, had continued to employ the wrecking company to raise the vessel and tow it into port, it is manifest that the Government would have been liable to the company for the entire expense incurred in that regard. The fact that, instead of doing this, the Government, after the vessel had been swung out of the channel, permitted the owners to take possession and have it raised and towed into port, can not deprive the wrecking company of its liens upon the vessel for all the charges so incurred or

enable the Government to assert any priority in the matter.

But while this may be so, I think, as above stated, that the Government is entitled, before paying any such claims, to demand that the vessel be brought within our jurisdiction, so that it may be attached and sold for the benefit of all claimants, including the Government, according to their respective rights and priorities.

I come now to your fourth question, "Whether or not, in view of the other claims against the vessel, the department has authority to pay the claims of the Reed Wrecking Company and thus secure the boat, so that suit can be brought against the vessel to enforce the lien for the amounts so paid."

In addition to the charge of \$18,000 for removing the vessel from the channel and \$12,000 for subsequently raising the vessel and towing it to Port Huron, Mich., you state that an estimate of cost of \$14,000 for repairing the vessel has been submitted. It does not appear that such repairs have in fact been made. If made, however, the liens upon the vessel for the expense thereof would probably be superior to that of the Government for the expense of removing the vessel from the channel, for the reasons above stated.

I doubt very much your authority to pay any claim of the Reed Wrecking Company other than that for the expense incurred under its contract with the Government to remove the vessel from the channel out of the appropriation made by section 20 of the act of March 3, 1899, which, so far as I am advised, is the only one applicable to any such purpose. That appropriation is for any "such sum of money as may be necessary to execute this section and the preceding section." Paying off subsequent claims in order to enable the Government to enforce its claim for the expense incurred in removing the vessel from the channel hardly seems to me to come within the terms of this appropriation. That appropriation was to enable the Government to defray the cost of removing an obstruction to navigation, and would of course apply to the expense incurred by the

Government in removing the vessel in question from the channel. After the vessel had been removed from the channel by the Reed Wrecking Company the Government could, and perhaps should, have given notice to the owners to pay the charges as provided in the act, and, upon their failure or refusal to do so, it might have disposed of the vessel in its submerged condition and turned the proceeds into the Treasury. This it did not do, however, but turned the vessel over to the owners, thus relinquishing its security. Doubtless, also, the War Department, after having the vessel removed from the channel, might have incurred the additional expense of raising and towing it into port. But as it did not do so, I am inclined to think that it has no authority to use the appropriation in question simply to protect the claims of the Government. The speculative nature of such a proceeding is manifest, as it is entirely problematical whether the vessel would sell for as much or more than the other claims against it.

In my judgment the proper course to pursue is to pay only the claim of the Reed Wrecking Company for the expense of removing the vessel from the channel, provided the company brings the vessel within the jurisdiction of the United States, so that, as above stated, it may be libeled and sold for the benefit of all claimants, according to their respective rights and priorities.

Respectfully,

GEORGE W. WICKERSHAM.

The SECRETARY OF WAR.

INCREASE OF PERMANENT NAVAL SUPPLY FUND—APPROPRIATION FOR HANDLING NAVAL STORES.

The increase of the permanent naval supply fund beyond the statutory limit of \$2,700,000, by adding to it all the stock technically known as "common general stock," is without warrant of law.

The expense of handling stores purchased under the naval supply fund, being specifically provided for in the annual naval appropriation acts, can not be legally charged to the working appropriations.

The words "accumulated naval supplies" in the act of March 2, 1889 (25 Stat. 817, 818), do not mean stores obtained by the application of balances of specific appropriations unused at the end of the fiscal year

to the purchase of articles not to be used in that year, and the transfer of such articles so purchased to the naval supply fund. The words referred to evidently designate supplies intended for use in the current year for which they were purchased and not used because in unanticipated excess of what were needed, or by some other fortuitous event.

The intentional acquisition of supplies for consumption or use in succeeding years, by purchases from appropriations for the current fiscal year, is inconsistent with the provisions of the act of March 2, 1889 (25 Stat. 817).

Supplies thus purchased should be utilized in advance of stores regularly purchased under the annual appropriation for the current fiscal year, and Congress should be advised of the circumstances of these accumulations.

The provisions in the act of June 30, 1890 (26 Stat. 205), as enlarged by the act of March 2, 1891 (26 Stat. 807), with regard to "arranging, classifying, consolidating, and cataloguing supplies for the Navy," is not to be considered as repealing any of the previous acts regarding the purchase and disposition of naval supplies.

The general public system for the appropriation and disbursement of public moneys is permanent, and unless charges are within the objects for which an appropriation is made they can not be applied to that appropriation.

DEPARTMENT OF JUSTICE,

February 28, 1910.

SIR: I have the honor to acknowledge the receipt of your letter of February 11 instant, in which you submit several questions as to the legality of some matters of administration in the Navy Department.

After reciting the facts as to creation and treatment of a permanent naval supply fund, you request my opinion as to whether the increase of such fund, described in your letter \$2,700,000, the total of the fund as expressly authorized by Congress, to the sum of \$11,728,713.80, as of June 30, 1908, at the expense of the yearly working appropriation, is legal?

The act of Congress approved March 3, 1893 (27 Stat. 723), provides:

"And the Secretary of the Treasury is hereby authorized and directed to cause general account of advances to be charged with the sum of \$200,000, which amount shall be carried to the credit of a *permanent naval supply fund* to be used under the direction of the Secretary of the Navy

NOTE.—This opinion was at first regarded as in a measure confidential and its publication, therefore, delayed.

in the purchase of ordinary commercial supplies for the naval service, and to be reimbursed from the proper naval appropriations whenever the supplies purchased under said fund are issued for use."

This fund was increased by appropriations from time to time, as follows: June 10, 1896, \$300,000 (29 Stat. 370); March 3, 1897, \$1,000,000, "making total of \$1,500,000" (29 Stat. 658); January 5, 1899, \$1,000,000 (30 Stat. 781); February 14, 1902, \$200,000 (32 Stat. 17).

The fund thus appropriated for amounted, at the last-mentioned date, to \$2,700,000. Although recommendations to that end have been frequently made, Congress has refused or neglected to further increase it. The character of the fund is explicitly stated in the act. The object for its establishment and the manner of its use appear to have been understood and strictly observed until within a very short time. The statute authorized a fund for the purchase of ordinary commercial supplies kept in an entirety by the requirement of reimbursement for the supplies purchased out of the fund when issued to any of the bureaus.

The Paymaster-General, in his report to the Secretary of the Navy for the year 1905, when urging an increase of the fund, says:

"* * * I believe that all ordinary commercial articles in common use by two or more bureaus should be purchased out of the naval supply fund; and, in order to bring its amount into some proportion to its purpose, I recommend that it be increased at once to \$5,000,000, and that the proceeds of sales of all condemned stores (except clothing and small stores, ordnance, and unserviceable vessels) be credited to this fund, instead of being covered into the Treasury.

"The great need now is not so much for increase of storehouses as for less accumulation of dead stock, and I am convinced that the prompt increase of the naval supply fund as recommended will, by consolidating a large quantity of ordinary supplies, tend decidedly to limit such accumulation, for the reason that naval supply fund stores can not at any time be drawn without reimbursement from

a current appropriation, and because, after such consolidation, the remnants of any one article would be reduced to those under a single appropriation only, instead of half a dozen or more remnants under as many different appropriations."

In his report for 1906 the same officer says:

"The need for a considerable increase in the naval supply fund becomes every day more manifest; and I again most earnestly recommend that the fund be so increased as to make its amount proportionate to its purpose. Until this is done the maintenance of separate stocks of the same article for different bureaus will continue to absorb a much greater aggregate sum under various appropriations, consequently requiring greater annual expenditures by reason of (a) increased cost of purchase in separate small lots, (b) greater expense for separate care and storage, and (c) unnecessarily large total quantities by reason of each bureau maintaining an individual reserve stock for emergencies, with resulting increased losses from deterioration. Each of the reasons which necessitated the creation of this fund would seem to afford sufficient argument to justify its increase to an amount sufficient to maintain a working stock of all ordinary commercial articles in common use by the different bureaus."

The account was kept in the Bureau of Supplies and Accounts in the Navy Department, stating the amount of the fund at \$2,700,000 until the year 1908. Article 1543 of the Navy Regulations in force prior to 1909 provided that "the accounts of these supplies" (purchased under naval supply fund) "shall be kept separate in every particular from those purchased under the various appropriations."

The practical construction given by Congress and the Navy Department to the provisions of the statutes in determining the character and amount of this fund is thus clearly shown.

The above-mentioned article, 1543, was omitted from the Naval Regulations promulgated in 1909.

The worth of the fund in 1908 was given as \$9,425,602.79; stock on hand, \$10,205,826.24.

In 1909 the worth of the fund is given as \$11,718,713.80; and the stock on hand \$13,697,422.24.

This extraordinary and rapid increase could have occurred in only one way. Supplies or funds must have been procured otherwise than as provided in the act of March 3, 1893. Was there any legal way in which this could be done?

The chief of the Bureau of Supplies and Accounts—the Paymaster General—in his report to the Secretary for the year 1907, after reciting the inconveniences and difficulties of keeping stock accounts, evolved a plan which he stated thus:

“It did not take long to determine that the corner stone of any system of bookkeeping that would give the expenditures under the subheads of appropriations must be some form of suspension account into which all stores purchased would go and from which all stores used must come. In the naval supply fund the Navy Department had such an account already in existence. If it could be extended so as to become a clearing house for stores, the problem was solved; the answer could be given. This bureau, therefore, with the concurrence of all the other bureaus, laid before the department a plan to consolidate under the naval supply fund all that stock technically known as ‘common general stock.’

“This plan was approved by the department, and thus was placed under one account all the reserve stock of the Navy, with some exceptions, * * * and these will, in all probability, eventually pass through this account.”

This “common general stock” is created in this way:

“* * * An annual appropriation being made for the purposes of a specific fiscal year, should be utilized for such purposes and not otherwise. Nevertheless circumstances required the existence of a reserve stock of supplies at navy yards and stations, and it was therefore customary to expend from annual appropriations toward the end of each fiscal year sufficient funds to lay up stores not necessary for the year in which the appropriation ran, but absolutely necessary for the first part of the succeeding fiscal year. The succeeding annual appropriations then drew upon the

stores so laid up without charge to them and were in turn called upon to provide a reserve toward the end of the fiscal year. This was true of each annual appropriation. Each lot of stores purchased during the fiscal year was necessarily maintained separate from every other lot until the fiscal year closed, when they were, with certain exceptions, turned into a 'common general stock.'"

Annual appropriations are those for the service of the given year for which they are estimated and appropriated. The statutes thus provide:

"SEC. 430, Revised Statutes. All estimates for specific, general, and contingent expenses of the Department, and of the several Bureaus, shall be furnished to the Secretary of the Navy by the chiefs of the respective Bureaus.

"SEC. 3676. All appropriations for specific, general, and contingent expenses of the Navy Department shall be under the control and expended by the direction of the Secretary of the Navy, and the appropriation for each Bureau shall be kept separate in the Treasury.

"SEC. 3678. All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others."

The annual appropriation acts are enacted in conformity with these mandatory provisions. They always are for the current fiscal year.

It is undoubtedly true that, in the ordinary conduct of administration, materials and supplies, properly purchased, remain unconsumed and unused at the end of the fiscal year.

This is recognized and has been provided for by statute.

The act of March 2, 1889 (25 Stat. 817, 818), provided:

"It shall be the duty of the Bureau of Provisions and Clothing to cause property accounts to be kept of all the supplies pertaining to the naval establishment, and to report annually to Congress the money values of the supplies on hand at the various stations at the beginning of the fiscal year, the dispositions thereof, and of the purchases, and the expenditures of supplies for the year, and the balances remaining on hand at the end thereof.

“And for the purpose of utilizing accumulated naval supplies, the transfer is authorized, after requisition upon the Paymaster-General of the Navy, of any supplies belonging to one bureau and available for the use of another without reimbursement therefor by the bureau receiving the supplies so transferred: *Provided*, That supplies obtained for a specific object and still needed therefor, and supplies bought within the fiscal year in which the requisition is made, and provisions, clothing, and small stores shall not be subject to transfer without charge under the terms of this act.”

If the statutes providing appropriations for a current fiscal year can receive the latitudinarian construction of permitting purchases of supplies, avowedly for use, not in that, but in another and succeeding year, it will hardly be contended that those supplies can, legally, be immediately taken from the bureau for which they were purchased and thrown into this miscellaneous “common general stock.” This would do away with the force of all the statutes making annual appropriations. It would utterly destroy the relation between the laws governing appropriations and expenditures. It would entirely ignore the fundamental rule of statutory construction, that all laws upon the same subject must be construed together.

In this statute of March 2, 1889, the words “accumulated naval supplies” do not mean stores obtained in this way by the application of unused balances of specific appropriations at the end of the fiscal year to the purchase of articles not to be used in that year and the transfer of such articles so purchased to the naval supply fund. The words “accumulated naval supplies” evidently designate supplies intended for use in the current year for which they were purchased and not used because in unanticipated excess of what were needed or by some other fortuitous event. The context shows this. It is required that the property accounts shall show “the purchases and the expenditures of supplies for the year, and the balances remaining on hand at the end thereof.” And to utilize accumulated supplies, the transfer is authorized of any supplies belonging to one bureau and available for the use

of another without reimbursement. The intentional acquisition of supplies, for consumption or use in succeeding years by purchases from appropriations for a current fiscal year is inconsistent with the provisions of this act. This is emphasized by the exceptions of the proviso. Supplies thus purchased should be utilized in advance of stores regularly purchased under the annual appropriations for the current fiscal year; and Congress should be advised of the circumstances of these accumulations, if they can be properly called accumulations, to guide it in making the regular annual appropriations for the year in which they are to be used.

However, even if not found in this statute, I understand it is contended that authority to create this common general stock fund and to include it in the naval supply fund is found in the act of June 30, 1890 (26 Stat. 205), as enlarged by the act of March 2, 1891 (26 Stat. 807).

These statutes are as follows:

"For expenses of arranging, classifying, consolidating, and cataloguing supplies for the Navy, herein provided for and now on hand, ten thousand dollars; and all supplies purchased with moneys appropriated by this act shall be deemed to be purchased for the Navy and not for any bureau thereof, and these supplies, together with all supplies now on hand, shall be arranged, classified, consolidated, and catalogued, and issued for consumption or use, under such regulations as the Secretary may prescribe, without regard to the bureau for which they were purchased.

"* * * and all supplies hereafter purchased with moneys appropriated for any branch of the naval establishment shall be purchased, classified, and issued for consumption or use subject to the provisions contained in the act making appropriations for the naval service, approved June thirtieth, eighteen hundred and ninety, in reference to supplies therein provided for and on hand."

This act can not be construed as repealing any of the previous acts regarding the purchase and disposition of naval supplies. The manner of appropriation of money

for the purchase of supplies in the different bureaus was not affected. The supplies were still to be purchased for the specified bureaus according to the existing law. All the supplies were to be classified so that accounts might be correctly kept. Where supplies, purchased for one bureau, were required for consumption or use in another bureau, the Secretary was authorized to prescribe regulations by which they could be taken or transferred for that purpose; and such regulations, as all regulations, must be in conformity with law existing when promulgated. The enactment was evidently intended to avoid any question as to the authority of the Secretary to meet a required need for the use or consumption of articles in a different bureau from the one from whose specified appropriation such articles had been purchased.

I have referred to these statutes to show how the annual appropriations for the naval service are made by Congress; and how the manner in which they are to be expended and accounted for is carefully provided by law.

The statute creating the naval supply fund is upon entirely different and incompatible principles. The appropriation made by it is a permanent specific appropriation. It is differentiated from annual appropriations, which we have been examining, and from permanent annual appropriations, which are mentioned in section 3689, Revised Statutes. It designates the exact amount and the object of the appropriation. It leaves nothing to the executive officers except to administer the specific obligation imposed by it. It differs from every other specific permanent appropriation in that it is never exhausted. By the process of reimbursement for all supplies furnished by it to be consumed or used, the fund is maintained uniform and unimpaired. It is, in the Navy Department, of its own kind. It can never have a balance to be covered into the Treasury. It can never have an accumulation to be transferred elsewhere.

This distinctive character, we have seen, has been until recently recognized in the department by Congress. The Navy Department for many years declared the account of the supplies purchased for the naval supply fund should be

kept separate in every particular from supplies purchased under the various appropriations. Congress made four distinct additions to the original amount and then refused to further increase it.

When this fund was created in 1893 the laws of March 2, 1889, and March 2, 1891, were in force. It was as feasible to augment the naval-supply fund from the supplies mentioned in these acts then as it was in 1907 or 1908. And yet to carry out and effectuate the policy established by this legislation no means were considered except additional specific appropriations.

To say that a distinction must be made between the naval-supply fund and stock placed in the fund, that the fund itself is not disturbed, but that a sum equal to its fixed amount is always retained, is without any justification in the statute or in fact.

The act of Congress has set the limit of the amount of the permanent fund which is to be kept constant by purchases and reimbursements. It may seem desirable to increase the limit, but, until Congress, which fixed it, deems it proper to increase it, no officer can legally do so.

Whether or not the scheme, as detailed by the Paymaster-General and adopted by the department, is wise and prudent and tends to economy and certainty of administration, is not within my province to determine. I can only say that, however admirable it may appear, the executive officers of the Government can not put it into operation unless it is sanctioned by law. If the laws are not comprehensive enough to accomplish, what are considered by the executive to be the best and most desirable results, the defects can not be supplied by executive order, but resort must be had to the law-making power.

For the reasons stated, I am constrained to the opinion that the increase of the permanent naval-supply fund, beyond the statutory limit of \$2,700,000, described in your communication, was without warrant of law.

You further request my opinion as to whether the expense of handling stores purchased under the naval-supply fund can be legally charged to the working appropriations. In the act making appropriations for the naval

service for the fiscal year ending June 30, 1910 (35 Stat. 767), under the heading of "Provisions, Navy," among other things, is provision for "expenses in handling stores purchased under the naval-supply fund." These expenses, being thus specifically provided for, must be paid in this and in no other way. The appropriation is an annual one and for a specific object and comes within the provisions of section 3678, Revised Statutes.

My attention has also been called to charges made for "fire insurance and depreciation on account of the capital account of the plant of the navy-yard as an industrial yard." These charges seem to be more in contemplation than in actual exercise except at one navy-yard. It is not within my authority to pass upon the elaborate system of accounting involved in these matters. Those are questions of administration wholly within the control of the Secretary of the Navy.

As far as the legality of these charges is concerned, I refer you to what I have already said as to receipts and expenditures in the departments. The statutes are plain and peremptory.

"SEC. 3678, Revised Statutes. All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no other.

"SEC. 3732. No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year."

The general public system for the appropriation and disbursement of public moneys is permanent and must be regarded by all executive officers. Unless the charges referred to are within the objects for which an appropriation is made they can not be applied to that appropriation.

Very respectfully,

GEORGE W. WICKERSHAM.

THE SECRETARY OF THE NAVY.

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Field Assistant on the Geological Survey—Acceptance of an order from the King of Sweden.—A field assistant on the United States Geological Survey designated as special agent, whose service is not continuous, who is paid by the day when actually employed, and who does not take any oath of office, is not an officer under the United States within the meaning of Article I, section 9, paragraph 8, of the Constitution, and he may therefore accept from the King of Sweden the order of the "Knighthood of the North Star." 598.

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 10. **Same—Certification of Eligibles—Civil service.**—The Attorney General can not properly render an opinion to the Secretary of Commerce and Labor upon the question whether the Civil Service Commission is authorized, under existing civil-service rules, to certify eligibles from the list of persons who have qualified as carpenters, from which selection may be made for filling temporarily a statutory position as clerk, as the question is not one arising in the administration of the Department of Commerce and Labor which the Secretary is called upon to determine. 431.
 11. **Same—Opinions for Guidance of Certain Prospective Bidders.**—The Attorney General is not authorized to express an official opinion as to whether the provisions of the eight-hour law of August 1, 1892 (27 Stat. 340), will apply to the construction of caissons for the United States, where the information is desired for the guidance of certain prospective bidders, as the question is not one which the Secretary of the Navy is called upon to decide in the administration of his department. 534.

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2. **Same.**—The Government has the right to lease lands in a State without the consent of the State, and since the leases contemplated constitute substantially fee simple estates, being for 999 years and the consideration therefor merely nominal, they do not come within the operation of Article I, section 14, of the constitution of New York of 1894, which prohibits the leasing of agricultural lands for a greater period than 12 years. *Ib.*

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2. **Same.**—The provision referred to was not, however, repealed by the act of July 2, 1909 (36 Stat. 1). *Ib.*
3. **Same.**—The expression "All employees of the Census Office," in section 10 of the census act of 1902, does not relate to enumerators or interpreters. *Ib.*

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2. **Same—Expatriation.**—The act of March 2, 1907 (34 Stat. 1228), regarding expatriation, is limited to naturalized citizens while residing in foreign countries beyond the period stated in that act, the object being to relieve the Government from the obligation of protecting such citizens after a residence abroad of sufficient duration to raise the presumption that they do not intend to return to the United States. *Ib.*
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3. **Same.**—Jurisdiction to determine the eligibility of an applicant for appointment in the classified service lies with the Civil Service Commission. *Ib.*
4. **Census act of 1909—Diplomatic and Consular Service.**—The proviso of section 7 of the census act of July 2, 1909 (36 Stat. 3), has no reference to examinations for positions in the Diplomatic and Consular Service which are not in the departments at Washington. 78.
5. **Same.**—The phrase "from any State or Territory" in that proviso refers to applications where it is requisite that the applicant should be of a particular State or Territory and charged to it under the law of apportionment, which is the case only with respect to appointments in the classified service in the departments at Washington and in the Census Bureau. *Ib.*
6. **Same.**—Opinions of August 18, 1909 (27 Op. 546, 567), are modified to the extent above indicated. *Ib.*
7. **Examination of Temporary Employee in Census Office for Position in Apportioned Service of the Government.**—A person employed in the temporary force of the Census Office, in an apportioned position and charged to the quota of his State, is not required by the proviso of section 7 of the act of July 2, 1909 (36 Stat. 3), to return to his State to take an examination for another position in the apportioned service of the Government. 348.
8. **Census Office Transfers.**—During the decennial census period clerks in the Census Office may be transferred from the permanent to the temporary force under the act of July 2, 1909 (36 Stat. 1), without losing their status in the classified service of the Government. 395.
9. **Eligibility of Carpenter to fill Temporary Clerkship.**—The Attorney General can not properly render an opinion to the Secretary of Commerce and Labor upon the question whether the Civil Service Commission is authorized, under existing civil service rules, to certify eligibles from the list of persons who have qualified as carpenters, from which selection may be made for filling temporarily a statutory position as clerk, as the question is not one arising in the administration of the Department of Commerce and Labor which the Secretary is called upon to determine. 431.

See also STATE, WAR, AND NAVY BUILDING.

CLAIMS. *See* SPANISH TREATY CLAIMS; VESSELS, 2-5.

COAL LANDS. *See* ALASKA, 3.

COASTING AND FOREIGN TRADE. *See* TONNAGE DUTIES, 7.

COASTWISE CARRYING TRADE. *See* VESSELS, 6.

COLLECTION.

OF CORPORATION TAX FROM ASSETS. *See* CORPORATIONS, 7-9.

COMMISSIONERS OF DEEDS.

1. **Commissioners of Deeds for the District of Columbia—Disqualification as Pension Attorneys.**—Commissioners of deeds for the District of Columbia are prohibited under the provisions of sections 109 and 113 of the Criminal Code of the United States (35 Stat. 1088) from acting as agents or attorneys in the prosecution of pension claims against the United States. 131.
2. **Same.**—Such commissioners are officers of the United States within the meaning of the above-quoted sections of the Criminal Code. *Ib.*

COMMON CARRIERS.

1. **Transportation of Letters and Packets Outside the Mail.**—Where a State by valid and lawful authority requires a common carrier to furnish reports relative to its traffic, the fulfillment of the duty thus imposed constitutes a part of the current business of the carrier, and these reports may be carried outside the mail without payment of postage, consistently with the provisions of section 184 of the Criminal Code. 537.
2. **Same.**—The different companies of an association of railroads, which is without corporate or legal existence, formed for the purpose of weighing all carload shipments moving over the lines of the railroads that are members of the association, should be treated as separate organizations in their relation to the mail service, and their right to send letters without payment of postage is not extended by section 184 of the Criminal Code. *Ib.*
3. **Same.**—Congress did not mean to do more than to permit carriers themselves, and particularly corporate carriers, to carry their own messages, which necessarily would be limited to their own business. *Ib.*
4. **Same.**—Companies which are distinct corporations, but have been merged into one system of railways, are limited in their right to carry letters outside the mail without payment of postage to the distinct corporations composing the system. Thus, one such company may carry its own letters addressed to another company to the point of connection and deliver them, and the second company may carry them to any point on its lines, but the latter could not act as an intervening company and carry and deliver letters written by the first company to a third company, although the latter belonged to the same system. *Ib.*

COMMON CARRIERS—Continued.

5. **Same.**—By section 184 of the Criminal Code Congress intended to adopt rather than set aside the opinion of Attorney General Harmon (21 Op., 394). *Ib.*
6. **Same.**—"Current business" is presumably any business of the carrier when it comes up in such a way as to call for current communication. *Ib.*

COMPENSATION. See **EMPLOYEES OF THE UNITED STATES.**

CONSTITUTION. See **ACCEPTANCE OF PRESENT; CORPORATIONS, 14, 15.**

CONSTRUCTION. See **DRY DOCKS, 1, 2; EIGHT-HOUR LAW, 2; NAVY, 2.**

CONTRACTS.

1. **Contract for Supplies—Departments and Independent Establishments of the Government—Forest Service.**—The R. P. Clarke Co. is bound by the contract it entered into with the "several departments and independent establishments of the Government" to furnish to the Department of Agriculture, for the use of the Forest Service, such amount of either of the varieties of cloth described in the contract as may be ordered by said department during the fiscal year ending June 30, 1910, notwithstanding the fact that it was not estimated by the general supply committee that any such cloth would be required by that department. 47.
2. **Same.**—What constitutes prompt delivery is a question of fact, in regard to which the Attorney General is not required, under section 356, Revised Statutes, to express an opinion. *Ib.*
3. **Contract for Supplies for the District of Columbia.**—The Secretary of the Treasury can not legally enter into a contract for furnishing supplies for the use of the government of the District of Columbia. 438.
4. **Same.**—Section 4 of the act of June 17, 1910 (36 Stat. 531), is not applicable to the government of the District of Columbia. *Ib.*
5. **Contracts—Waiver of Performance—Increased Tariff Duties.**—The Secretary of War has authority to refrain from compelling full performance of a contract for the delivery of 300,000 pairs of men's gloves, to be made in Germany, where, after a partial performance of the contract, an act of Congress increased the duty on the gloves 120 per cent. 121.
6. **Same—Relieving Contractor.**—He should not, however, relieve the contractor with regard to gloves delivered or which should have been delivered prior to the taking effect of that act. *Ib.*
7. **Same—Scope of Authority.**—The Attorney General does not concur in the view that executive officers are limited in matters of this kind wholly to considerations affecting the pecuniary interests of the Government. *Ib.*

FOR FURNISHING CAISSONS. See **EIGHT-HOUR LAW, 3.**

FOR FURNISHING OILS. See **ISTHMIAN CANAL COMMISSION.**

CONTRACTS—Continued.

FOR PURCHASE OF MATERIAL FROM UNLAWFUL TRUST. *See* PANAMA CANAL.

FILING OF CONTRACTS, RECLAMATION SERVICE. *See* RECLAMATION SERVICE.

COPYRIGHT LAWS.

1. **Importation of Copyrighted Books Bound Abroad.**—Books copyrighted under the laws of the United States and printed from type set and plates made in this country, the printed sheets of which were sent to Belgium and there bound, can not, under section 31 of the copyright law of March 4, 1909 (35 Stat. 1082), be legally returned to or imported into the United States. 90.
2. **Same.**—That section embraces every American copyright in a book, regardless of whether the copyright was obtained under the copyright laws embodied in the Revised Statutes, the copyright act of 1891, or the act of 1909. *Ib.*
3. **Importation of Copyrighted Books Rebound Abroad.**—Copyrighted books which have been printed from type set within the United States, and the printing and binding both performed within the limits thereof, may be rebound abroad and imported without violating section 31 of the copyright act of March 4, 1909 (35 Stat. 1082). 209.
4. **Same.**—A book is “produced” within the meaning of section 31 of the copyright act when it is printed and bound. Its manufacture is then completed and it becomes entitled to all the protection offered by the copyright laws. *Ib.*
5. **The renewal or extension of copyrights** under section 24 of the act of March 4, 1909 (35 Stat. 1080), can be secured only by the person or persons specifically designated in the statute, and can not, therefore, be granted to the assignee of the copyright. 162.
6. **Same.**—The privileges of copyright are purely statutory, and the right to a renewal or extension of a copyright must be found within the statute. *Ib.*
7. **Registration of Typewritten Documents.**—Typewritten pages fastened together and having a printed cover and title-page are subject to registration under the copyright law of March 4, 1909 (35 Stat. 1075). 265.
8. **Same.**—The meaning of that clause in section 12 of the act of 1909, which provides that the book “shall have been produced in accordance with the manufacturing provisions of section 15 of that act,” is that the book shall not have been produced in violation of that act; but the provision does not attempt to prescribe any regulation as to the form in which the book should appear. Section 15 means that if the book is printed, the printing shall be done as required therein. *Ib.*
9. **Registration—Fragment of Book Deposited.**—Application for registration of copyright should be denied (1) where the *ad interim* deposit under section 21 of the copyright act of March 4, 1909

COPYRIGHT LAWS—Continued.

- (35 Stat. 1080), is a complete book, and the permanent deposit under section 22 is only a part of such book; (2) where both the *ad interim* and permanent deposits are fragments of the work; (3) where the copy, printed and bound in accordance with the manufacturing provisions of section 15 of the act and deposited in the first instance, is only a fragment of the work; and (4) where a complete book is deposited, but the affidavit correctly indicates that only a part of the work is printed in the United States. 176.
10. **Same.—The word "book,"** as used in sections 21 and 22, and in class (a) of section 5, and elsewhere in that act, means the entire book and not a fragment thereof. *Ib.*
 11. **Registration of Post-card Lithographs made in Germany.**—Lithographic reproductions of original paintings, in the form of illustrated post-cards, made in Germany, are subject to registration under the copyright law of March 4, 1909 (35 Stat. 1075), provided the original paintings may properly be classified as works of art. 150.
 12. **Registration of Lithographs of Works of Art Located Abroad.**—The Register of Copyrights has authority to enter a claim in a painting which is made merely as a first step in the production of a lithograph as a "work of art" within the meaning of section 11 of the copyright law of March 4, 1909 (35 Stat. 1078), provided the painting itself is a work of art. 557.
 13. **Same.**—The Register of Copyrights has the authority to enter a claim to copyright in a published lithograph, not made within the United States, where the design, drawing, or painting which forms the first step in the production of such lithograph has been made for the purpose of being converted into a lithograph and is located in a foreign country, provided the design, drawing, or painting with reference to which the application is made is a work of art. *Ib.*
 14. **Same.**—The meaning of the term "work of art" and its application to a particular design, drawing, or painting, etc., under section 11 of the act of March 4, 1909 (35 Stat. 1078), does not present a question of law, but one of fact, to be determined in each instance by the Register of Copyrights. *Ib.*
 15. **Foreign Authors—Proclamation of the President.**—A foreign author or proprietor, not domiciled within the United States at the time of the first publication of his work, is not entitled to the benefits conferred by the copyright act of March 4, 1909 (35 Stat. 1075), until after the President has issued a new proclamation declaring the existence of the reciprocal conditions set forth in that act. A previous proclamation under the act of March 3, 1891, section 13 (26 Stat. 1110), is not sufficient. 222.
 16. **Same—Proclamation does not create a Right.**—In such a case the proclamation issued by the President does not create the right

COPYRIGHT LAWS—Continued.

of foreign authors or proprietors to enjoy the privileges of our copyright laws, but is only the evidence of the existence of conditions under which those rights and privileges may be exercised, and is conclusive evidence on that point. *Ib.*

17. **Same—May be Retroactive.**—The new proclamations may be retroactive in terms and effect. *Ib.*

See also PATENT OFFICE.

CORPORATIONS.

1. **Corporation Taxes—Gross Income—Interest on United States Bonds.**—In computing the amount of the gross income of corporations subject to the tax provided by the act of August 5, 1909 (36 Stat. 11, 112), the interest received on its United States bonds should, under the provisions of section 38 of that act, be included. 138.
2. **Same.—Such interest should not be deducted from the gross income of the corporation for the purpose of ascertaining the net income, to be used as a basis for computing the amount of the taxes to be paid.** *Ib.*
3. **Same.—The tax imposed by section 38 is not a tax upon the property of the corporation, but is specifically “a special excise tax with respect to the carrying on or doing business by such corporation.”** It is in the nature of a tax imposed upon the privilege of carrying on the business. *Ib.*
4. **Same—Net Income—Dividends from Corporation having Net Income less than \$5,000.**—In computing the net income of a corporation under section 38 of the act of August 5, 1909 (36 Stat. 112), known as the “corporation tax law,” the dividends received by it as a stockholder of any other corporation of a character to which that act applies should be deducted from its gross earnings, regardless of the amount of the net income of such dividend-paying corporation. 140.
5. **Same—Interest Paid on Mortgage.**—In ascertaining the net income of a corporation holding and dealing in real estate, under section 38 of the act of August 5, 1909 (36 Stat. 112), interest on an indebtedness assumed by the corporation and secured by mortgage upon the properties which it acquires can be deducted only to an amount not exceeding the interest on the paid-up capital stock of such corporation. 198.
6. **Same—Where Indebtedness is not Assumed.**—Where a realty corporation takes title to real property subject to a mortgage, but does not assume the indebtedness secured thereby, the interest on such indebtedness should be deducted from the gross income of the corporation. *Ib.*
7. **Same—Collection from Assets.**—Corporations engaged in business after the approval of the corporation-tax law of August 5, 1909 (36 Stat. 112), but dissolved prior to December 31, 1909, are liable to the tax imposed under section 38 of that act. 241.

CORPORATIONS—Continued.

8. **Same.**—Assets of a corporation are subject to a lien for the payment of taxes provided the corporation has not been dissolved and all its assets distributed prior to the time the list of assessments came into the hands of the collector. *Ib.*
9. **Same.**—Where the corporation is dissolved before the taxes become due, and no lien attaches to the assets of a corporation, as in the case first above referred to, the tax imposed may be collected by the Government by pursuing the assets into the hands of the stockholders, in the same manner as any other creditor might obtain satisfaction of his debt. *Ib.*
10. **Same.**—Partnership associations, organized under the laws of Pennsylvania, possess every privilege and power essential to a corporation and are liable to the tax imposed under section 38 of the act of August 5, 1909 (36 Stat. 112). 189.
11. **Same.**—Mutual savings banks, organized under the laws of West Virginia, while in a sense organized for profit, have not a capital stock represented by shares, and are not therefore subject to the tax imposed under section 38 of the act of August 5, 1909 (36 Stat. 112). *Ib.*
12. **Same.**—So-called savings banks which have a capital stock similar to other banking institutions, are not exempt from the tax imposed under section 38 of the above-cited statute. *Ib.*
13. **Foreign Steamship Companies whose Vessels ply between American and Foreign Ports.**—Foreign steamship companies engaged in the business of transporting passengers, goods, and merchandise between ports in this country and foreign ports, and maintaining passenger and freight agencies in this country, are corporations subject to the special excise tax created by section 38 of the act of August 5, 1909 (36 Stat. 112). 211.
14. **Same.**—A tax imposed upon an exporter of merchandise as an incident to his business is not a tax upon the exported article, as an export, and hence is not violative of section 9, Article I, of the Constitution. *Ib.*
15. **Same.**—Passengers are not exports within the meaning of the above-cited provision of the Constitution. *Ib.*
16. **Same.**—Companies known as the Snow Associates, the Department-Store Trust, the Real Estate Trust, etc., organized under and by an agreement and declaration of trust for the purpose of improving and holding real estate, the title to which is vested exclusively in trustees who are removable by vote of the stockholders, and the stock being transferable, which companies possess all of the essential elements of a common-law joint stock company, are "joint stock companies or associations organized for profit and having a capital stock represented by shares," organized under the laws of a State, within the intent of section 38 of the act of August 5, 1909 (36 Stat. 112) and are amenable to the tax imposed thereby. 234.

See also PHILIPPINE ISLANDS, 4.

COURT MARTIAL. *See* NAVY, 3-5.

COURTS. *See* PHILIPPINE ISLANDS, 10.

CUSTOMS LAW.

1. **Importation of Torpedoes for the United States.**—Whitehead torpedoes imported from Europe into the United States to be distributed among the torpedo-boat destroyers of the United States are dutiable under the tariff act of August 5, 1909 (36 Stat. 11), but until they are carried to a place where there is a port collector where they may be entered, and the duties ascertained and paid, no duty would become payable. 599.
2. **The word "importation,"** as used in the customs laws, is the bringing of goods into the ports of the United States for the purpose of introducing them into the commerce of the country. 173.
3. **Passengers are not exports** within the meaning of section 9, Article I, of the Constitution. 211.

See also PHILIPPINE ISLANDS, 1, 2.

DEER SKINS. *See* ALASKA, 1, 2.

DEPARTMENT OF AGRICULTURE.

CONTRACT FOR SUPPLIES FOR FOREST SERVICE. *See* CONTRACTS, 1, 2.

TRANSFER OF CAMP HANCOCK TO DEPARTMENT OF AGRICULTURE.
See CAMP HANCOCK.

DEPARTMENT-STORE TRUST. *See* CORPORATIONS, 16.

DIPLOMATIC AND CONSULAR SERVICE. *See* CIVIL SERVICE, 4.

DISCHARGE. *See* NAVY, 3.

DISCONTINUANCE. *See* PENSION AGENCIES.

DISTRICT OF COLUMBIA.

1. **Ownership of Submerged Land—Potomac River.**—The United States is the owner of the submerged land and also the bed of the navigable portion of Potomac River within the original limits of the District of Columbia. 366.
2. **Title to Lands South of Squares Nos. 955 and 979.**—All land south of 140 or 138 feet on Tenth Street and the southern boundary line of squares 955 and 979, in the District of Columbia, is the property of the United States. Land made by artificial means does not fall within the doctrine of accretions. 402.
3. **Commissioners of deeds for the District of Columbia** are prohibited under the provisions of sections 109 and 113 of the Criminal Code of the United States (35 Stat. 1088) from acting as agents or attorneys in the prosecution of pension claims against the United States. 131.
4. **Contract for Supplies.**—The Secretary of the Treasury can not legally enter into a contract for furnishing supplies for the use of the government of the District of Columbia. 438.
5. **Same.**—Section 4 of the legislative, executive, and judicial appropriation act of June 17, 1910 (36 Stat. 531), is not applicable to the government of the District of Columbia. *Ib.*

DRY DOCKS.

1. **Construction of New York Dry Dock—Appropriation.**—The Secretary of the Navy has no power, after exhausting the present appropriation for the erection of the New York Dry Dock (36 Stat. 615), to use funds from other appropriations not strictly applicable to that work in order to meet the payments to be made on the contract until a deficiency appropriation shall be made. 466.
2. **Same.**—The work may continue, however, and the legal obligation rests upon the Government to provide payment therefor. *Ib.*
3. **Dry dock of Skinner Ship Building, etc., Co., Baltimore, Md.—Right of United States to use the dock.**—The Skinner Ship Building & Dry Dock Co., successors to the Baltimore Dry Dock Co., of Baltimore, Md., whose dry dock is on the Fort McHenry tract in Baltimore on land which was conveyed to the Baltimore Dry Dock Co. by the United States under the authority of the act of June 19, 1878 (20 Stat. 167), on conditions therein stated, is required to accord to the United States the right to use the dry dock at any time "for the prompt examination and repair of vessels belonging to the United States, free from charge for docking." 303.
4. **Same.**—The Skinner Co. has no right to prevent the United States from employing the crew of one of its vessels, or any other person, from making repairs to the bottom or any other part of such vessel while it is in the dry dock. *Ib.*
5. **Same.**—That company may attach a condition, of the character described, to its proposal to do the work of docking, cleaning, and repairing of the ship, but if the Government declines the proposal the company can not interfere with the work of any other person or company that may bid for the work. *Ib.*
6. **Removal of floating dry dock from Algiers, La., to Guantanamo, Cuba.**—The President has no power, in the absence of an emergency making such action imperative for the protection of the interests of the Government, to remove to the naval station at Guantanamo, Cuba, the floating dry dock which was constructed and located at the naval reservation at Algiers, La., under the provisions of the act of May 4, 1898 (30 Stat. 379). 511.

DUTY.

IMPORTATION OF TORPEDOES FOR THE UNITED STATES. *See* CUSTOMS LAW.

INCREASE OF, AS AFFECTING CONTRACTS WITH THE GOVERNMENT. *See* CONTRACTS, 5, 6.

EIGHT-HOUR LAW.

1. **Construction of Naval Vessels.**—The provision of the naval appropriation act of June 24, 1910 (36 Stat. 628), which makes the act of August 1, 1892 (27 Stat. 340), known as the eight-hour law,

EIGHT-HOUR LAW—Continued.

applicable to the construction of naval vessels, should be construed to apply simply to work done on the vessel itself at the place where it is built and not to the manufacture elsewhere of machinery or other material which is to enter into the construction of the vessel. 358.

2. **Construction of Submarine Torpedo Boats.**—The act of August 1, 1892 (27 Stat. 340), known as the eight-hour law, does not apply to the construction of torpedo boats and torpedo-boat destroyers provided for in the act of June 24, 1910 (36 Stat. 628). 406.
3. **Contract for Furnishing Caissons for the Government.**—The Attorney General is not authorized to express an official opinion as to whether the provisions of the eight-hour law of August 1, 1892 (27 Stat. 340), will apply to the construction of caissons for the United States, where the information is desired for the guidance of certain prospective bidders, as the question is not one which the Secretary of the Navy is called upon to decide in the administration of his department. 534.

ELECTIONS.

Municipal Elections are not General Elections—Naturalization Act.—Municipal elections held through the State of Pennsylvania do not constitute a general election within the meaning of section 6 of the naturalization act of June 29, 1906 (34 Stat. 596, 598), which provides that no person shall be naturalized within 30 days preceding the holding of any general election. 146.

ELIGIBILITY. See **CIVIL SERVICE**, 2, 3, 9.

EMBEZZLEMENT. See **NAVY**, 4.

EMPLOYEES OF THE UNITED STATES.

1. **Compensation—Disease Contracted in Course of Employment by United States.**—An artisan or laborer employed by the United States in the construction of river and harbor work, who contracted a severe cold in the course of his employment resulting in pneumonia and which incapacitated him for duty for a period lasting more than 15 days, is not entitled to compensation under the act of May 30, 1908 (35 Stat. 556). 254.
2. **Same.**—The word "injury," as used in above statute, is in no sense suggestive of disease, nor has it ordinarily any such significance. *Ib.*

Opinion of May 17, 1909 (27 Op. 346), reviewed. *Ib.*

See also **WITNESSES**.

ENGINEER CORPS. See **ARMY**, 1-3.

ENUMERATORS. See **CENSUS OFFICE**, 1, 3.

EXAMINATION. See **CIVIL SERVICE**, 7.

EXECUTIVE DEPARTMENTS. See **PUBLIC PRINTER**, 3-9; **PURCHASE OF SUPPLIES**, 1-10.

EXECUTIVE ORDER. See **STATE, WAR, AND NAVY BUILDING**.

EXEMPTION.

FROM TAXATION. *See* PORTO RICO, 3-6.

EXPATRIATION. *See* CITIZENSHIP, 2.

EXPORTS. *See* CORPORATIONS, 14, 15.

FEDERAL PRISONERS.

1. **Allowance for Good Conduct.**—The right of a Federal prisoner under the acts of June 21, 1902 (32 Stat. 397), and April 27, 1906 (34 Stat. 149), to a deduction from his term of imprisonment for good conduct, is dependent upon his complying with the conditions therein named. If he faithfully observes all the rules and has not been subjected to punishment, he is entitled to the credit specified; if not, he is entitled to no reduction whatever. 109.
2. **Same.**—A prisoner who has violated the conditions named must serve his entire term unless the Attorney General shall, in his discretion, restore to him all or a part of the time thus lost. *Ib.*
3. **Same.—Record for Entire Term.**—The record of conduct essential to entitle the prisoner to credit is not his record for any particular month or year, but for the entire term. *Ib.*

FIELD ASSISTANT.

GEOLOGICAL SURVEY. *See* ACCEPTANCE OF PRESENT.

FINES. *See* VESSELS, 6.

FLOATING DRY DOCK. *See* DRY DOCK, 6.

FLORIDA. *See* SPANISH TREATY CLAIMS.

FOREIGN AUTHORS. *See* COPYRIGHT LAWS, 15, 16.

FOREIGN CORPORATIONS. *See* PHILIPPINE ISLANDS, 4.

FOREIGN-BUILT PLEASURE YACHTS. *See* TONNAGE DUTIES, 4, 6.

FOREIGN STEAMSHIP COMPANIES. *See* CORPORATIONS, 13.

FOREIGN VESSELS. *See* VESSELS, 6.

FOREST RESERVES.

1. **Lands temporarily withdrawn from entry** for further examination with a view to their inclusion in a definite forest reservation constitutes "temporary forest reserves" within the meaning of the act of June 11, 1906 (34 Stat. 233). 424.
2. **Same.**—The principle announced in the opinion of Acting Attorney General Fowler (28 Op. 424), that lands withdrawn from entry with a view to their inclusion in a national forest constitute a temporary forest reserve within the meaning of the act of June 11, 1906 (34 Stat., 233), concurred in. 522.
3. **Boise National Forest—Preferential right of selection by State of Idaho—President's proclamation.**—The right of the State of Idaho to make lieu selections of public lands pursuant to proceedings taken and a survey had under the act of August 18, 1894 (28 Stat. 394), was defeated by the President's proclamation setting aside the lands in question as part of a forest reserva-

FOREST RESERVES—Continued.

tion (34 Stat. 3058), such proclamation having been promulgated after the filing of the State's application for survey but before the filing of any list of selections on its behalf. 587.

4. *Same*—The application of the State was not a "filing" within the meaning of that clause of the proclamation which purports, on certain conditions, to except from its operation, "All lands which may have been, prior to the date hereof, * * * covered by any lawful filing duly of record in the proper United States Land Office." *Id.*

5. *Same*—**Lands Remain Public Lands.**—Notwithstanding the State's application for a survey the lands in question remained "public lands" within the meaning of section 24 of the act of March 3, 1891 (26 Stat. 1103), empowering the President to set apart "public lands" as forest reservations. *Id.*

Opinion of September 15, 1907 (27 Op. 605), affirmed and extended. *Id.*

FOREST SERVICE. *See* **CONTRACTS**, 1.

FRIAR LANDS. *See* **PHILIPPINE ISLANDS**, 3.

FUR-SEAL SKINS.

Fur-seal Skins on Vessels Seized—Importation.—Fur-seal skins taken in waters outside of the 3-mile limit, but within the area described by section 1 of the act of December 29, 1897 (30 Stat. 226), and afterwards seized on schooners engaged in unlawful seal fishing within the 3-mile limit, are forfeitable to the United States and need not be destroyed as directed by section 9 of that act, as this does not constitute an importation within the meaning of that section. 173.

GEOLOGICAL SURVEY. *See* **ACCEPTANCE OF PRESENT.**

GLOBE SURETY CO. *See* **SURETY COMPANIES.**

GOOD-CONDUCT ALLOWANCE. *See* **FEDERAL PRISONERS.**

GOVERNMENT.

Express statutory authority is not required for every administrative act. 549.

See also **PERSONAL RIGHT.**

GOVERNMENT EMPLOYEES. *See* **WITNESSES.**

GOVERNMENT PRINTING OFFICE. *See* **PUBLIC PRINTER.**

GRADE. *See* **NAVY DEPARTMENT**, 5, 6.

GREAT LAKES. *See* **TONNAGE DUTIES**, 7.

GUARANTY COMPANIES. *See* **OFFICIAL BONDS**, 3; **BONDS**, 1-5.

HARBOR LINES. *See* **HUDSON RIVER.**

HETCH-HETCHY VALLEY. *See* **ARMY**, 1.

HOMICIDE. *See* **PHILIPPINE ISLANDS**, 8.

HUDSON RIVER.

Harbor Lines—Shoal Water.—The establishment of harbor lines on the Hudson River from Troy to below New Baltimore does not preclude the Government, in the prosecution of improvements in said river in the interest of commerce and navigation, from depositing the excavated material in the areas of shoal water behind and shoreward of the said lines without the consent of the owners and without making compensation. 433.

IDAHO. *See* FOREST RESERVES, 3-5.

IMPORTATION. *See* CUSTOMS LAW, 1-3.

INCOME TAXES. *See* CORPORATIONS, 1-3.

INDIANS.

Employment of Mr. Hill as Attorney for Choctaw Nation.—The firm of McCurtain & Hill having been employed by contract as counsel to represent the Choctaw Nation for a period of five years, and Mr. McCurtain having become principal chief of the Choctaw Nation by appointment from the President before the expiration of that period, Mr. Hill, the remaining member of the firm, can not continue to act as counsel for the tribe without a new contract, which contract must be approved by Congress. 568.

INFRINGEMENT. *See* PATENTS.

INTEREST. *See* CORPORATIONS, 1, 2, 5.

INTERMENT OF OFFICERS. *See* REVENUE CUTTER SERVICE, 3.

INTERNAL REVENUE.

1. **Special Taxes—Form of Record.**—The record of special taxes which the collectors of internal revenue are required to make under section 3240 of the Revised Statutes, as amended by the act of June 21, 1906 (34 Stat. 387), should be in such form as to show clearly in each instance the business for which the special taxes are paid. The words should be written in full, not abbreviated. 561.

2. **Reclamation of Alcohol from the Staves of Empty Spirit Packages—Attorney General, Opinions.**—The Attorney General can not properly express an official opinion upon the legality of certain orders issued by the Commissioner of Internal Revenue prohibiting the reclamation of alcohol from the staves of empty spirit packages, in the absence of affirmative proof that such alcohol had been properly tax paid, for the reason that the question has been decided by the Treasury Department, and is presented merely because of the request of counsel for parties interested, and for the further reason that the question must ultimately be decided by the courts. 596.

MARKING OF IMPORTED LIQUORS. *See* SECRETARY OF THE TREASURY.

INTERNAL REVENUE STAMPS. *See* PHILIPPINE ISLANDS, 5.

ISTHMIAN CANAL COMMISSION.

1. **Award of Contract for Furnishing Oils.**—A contract for furnishing oils to the Isthmian Canal Commission may be awarded under the provisions of War Department circulars of December 11, 1909, and February 9, 1910, only to bidders who have acquired these products bona fide and in their own right and not as middlemen or agents of such companies as have been adjudicated parties to an unlawful trust and monopoly. 218.
2. **Same.**—A contract for furnishing oils to the Isthmian Canal Commission may be awarded under War Department circular of December 11, 1909, to a bidder who, at the time the contract is entered into, satisfactorily shows that he has acquired these products bona fide and in his own right, either in immediate possession or for future delivery. The contract is not vitiated if these supplies are to be obtained from a prohibited company, provided that company has no interest whatever in the sale to the Government. 231.
3. **Same.**—A contract for furnishing oils to the Isthmian Canal Commission may be awarded to a bidder who either owns the oils or, at the time the agreement is made, has a valid contract to have the oils supplied; and the contract is not to be withheld because the oils are to be obtained from a company prohibited from selling to the Government, providing said company has no interest in the award. 239.

IRRIGATION. *See* RECLAMATION SERVICE.

JURISDICTION. *See* PHILIPPINE ISLANDS, 8.

KING OF SWEDEN. *See* ACCEPTANCE OF PRESENT.

LABEL. *See* PURE FOOD LAW, 1.

LARD SUBSTITUTE. *See* MEAT INSPECTION.

LEASE. *See* CANADIAN BOUNDARY; MINE RESCUE WORK, 5.

LEAVES OF ABSENCE.

Employees of the navy yards, gun factories, naval stations, and arsenals of the United States Government, working under continuous employment, are not day laborers or piece workers in the ordinary sense of that term, and are therefore entitled to leaves of absence as provided by the act of February 1, 1901 (31 Stat. 746). 339.

LEE, ROBERT E. *See* CAPITOL, THE.

LIENS. *See* CORPORATIONS, 8; VESSELS, 3, 4.

MADE LANDS. *See* DISTRICT OF COLUMBIA, 2.

MAIL. *See* COMMON CARRIERS.

MAINE. *See* BATTLESHIP MAINE.

MARINE CORPS.

1. **Officers of Marine Corps—Authority to Command in the Army.**—Article 122 of the Articles of War does not operate to give to

MARINE CORPS—Continued.

officers of the Marine Corps any authority to exercise command in the Army unless they have been detached for service with the Army by order of the President and are still serving with the Army under that order. 15.

2. **Same.**—When any part of the Marine Corps is present with the Army and engaged in a common enterprise with it, without an order of the President detaching it for service with the Army, the case is one of cooperation and not of incorporation, and in such a case no officer of the Marine Corps can exercise command over the Army any more than a naval officer can when some part of the Navy is cooperating with the Army; and the converse is true of Army officers cooperating with the Marine Corps. *Ib.*
3. **Same.**—The Marine Corps is a part of the naval establishment and is subject to the laws and regulations for the government of the Navy, save in the single instance when it has been "detached for service with the Army by order of the President." *Ib.*
4. **Commandant of Marine Corps—Retirement—Temporary Filling of Vacancy.**—After a commandant of the United States Marine Corps is placed upon the retired list of officers of that corps, on account of age, he can not legally be retained in his former office of commandant of the Marine Corps until his successor is appointed. 486.
5. **Same—Temporary Detail.**—An officer on the active list of the Marine Corps can not be temporarily detailed to fill a vacancy thus created with authority to transact official business and sign orders and correspondence as "Acting commandant, United States Marine Corps." *Ib.*
6. **Same—The Orders and Correspondence.**—During a vacancy caused by the retirement of a commandant of the United States Marine Corps the orders and correspondence connected with the office should be signed by the Secretary of the Navy or by the Acting Secretary in person. *Ib.*

MARKING OF IMPORTED LIQUORS. See SECRETARY OF THE TREASURY.**MEAT INSPECTION.**

1. **Meat Food Product—Lard Substitute.**—The inspection authorized under the meat-inspection provisions of the act of June 30, 1906 (34 Stat. 674), does not apply alone to establishments in which both the slaughtering of the animal and the preparation of the meat food products are carried on, but to all establishments in which any of the processes required, from the slaughtering to the finishing of the meat food product, is conducted. 369.
2. **Same.**—The term "similar establishments," as used in the meat-inspection law, was intended to include all establishments which are not specifically mentioned in which the animal is slaugh-

MEAT INSPECTION—Continued.

- tered or the carcass or meat is prepared, or in which the meat food product is manufactured. *Ib.*
3. **Same—Inspection.**—Whether or not lard substitute and the establishments where the same is manufactured are subject to inspection under the meat-inspection law depends upon the determination whether lard substitute is a “meat food product.” *Ib.*
 4. **Same—Meat Food Product.**—The language of the meat-inspection law indicates that the term “meat food product” does not merely embrace a food which consists wholly of the meat of an animal. *Ib.*
 5. **Same—Question of fact.**—The determination of the meaning of the term “meat food product” is essential to the proper enforcement of the meat-inspection law, and as Congress has not defined the term and it has no well-defined meaning, but is one of commercial usage, such determination is not a question of law upon which the Attorney General may express an opinion, but is a question of fact. *Ib.*
 6. **Same.**—Congress having vested in the Secretary of Agriculture the power to make such rules and regulations as may be necessary for the efficient execution of the provisions of the meat-inspection law, the power to determine what manufactures are “meat food products” rests in the Secretary of Agriculture, subject to the restriction that the definition of the term adopted be not clearly and unquestionably outside the intent of the act. *Ib.*
 7. **Same.**—The definition of a “meat food product” as given by the Secretary of Agriculture in regulation 3, section 8, is valid. *Ib.*

MIDSHIPMAN. *See* NAVAL ACADEMY, 3, 5.

MILITARY POST.

Lands reserved for military purposes can not be transferred to any other department without an act of Congress. 143.

MINE RESCUE WORK.

1. **Purchase of Land for Experimentation and Instruction—Bureau of Mines.**—The acts of May 16, 1910 (36 Stat. 369), establishing a Bureau of Mines, and of June 25, 1910 (36 Stat. 742), making appropriation for its maintenance, do not authorize the purchase of land for mine rescue stations. 413.
2. **Same—Lands Acquired Without Consideration.**—Lands, or interest in lands, acquired by the United States without consideration, or for a mere nominal sum, do not evidence a purchase within the meaning of section 355 of the Revised Statutes. *Ib.*
3. **Same—Erection of Temporary Structures.**—Moneys appropriated for the maintenance of the Bureau of Mines may be expended in the erection of temporary structures on land acquired by the United States for mine rescue work. *Ib.*
4. **Same.**—The validity of the titles to the lands proposed to be acquired for mine rescue work should be submitted to the Attorney General. *Ib.*

MINE RESCUE WORK—Continued.

5. **Lease of Mine for Experimentations.**—The leasing of a mine in Pennsylvania by the United States on a cash payment of \$1,500, for experimentations in mine rescue work, constitutes a purchase of land within the meaning of section 3736, Revised Statutes, which provides that no land shall be purchased on account of the United States except under a law authorizing such purchase. 463.
6. **Same.**—The statement in the opinion of September 15, 1910 (*ante*, p. 413), that it would be a wise precaution to have the titles to tracts of land to be acquired for the above-named purpose submitted to the Attorney General for his opinion as to validity, regardless of whether section 355, Revised Statutes, be applicable or not, contains no intimation that when section 355 does not apply the opinion of the Attorney General is not necessary. *Ib.*

MISSISSIPPI RIVER BRIDGE.

AT HILL CITY, MINN. *See* BRIDGES, 2-4.

MORTGAGES. *See* CORPORATIONS, 5, 6.**MOUND CITY NATIONAL CEMETERY.**

Abandonment of Roads leading thereto.—The proviso in the sundry civil act of June 25, 1910 (36 Stat. 723), restricting appropriations for national cemeteries or the repairs of roadways thereto to the maintenance of a single approach to any national cemetery, was not intended by Congress as general legislation and does not indicate an intention to abandon two of the three roads approaching the Mound City National Cemetery, near Cairo, Ill. 472.

MUNICIPAL ELECTIONS. *See* ELECTIONS.**MUTUAL SAVINGS BANKS.** *See* CORPORATIONS, 11.**NATIONAL CAPITOL.** *See* CAPITOL, THE.**NATIONAL CEMETERIES.** *See* REVENUE-CUTTER SERVICE, 3.**NATURALIZATION.**

Municipal Elections not General Elections within meaning of Naturalization Act.—Municipal elections held through the State of Pennsylvania do not constitute a general election within the meaning of section 6 of the naturalization act of June 29, 1906 (34 Stat. 596, 598), which provides that no person shall be naturalized within 30 days preceding the holding of any general election. 146.

See also CITIZENSHIP.

NAVAL ACADEMY.

1. **Nominations for Appointment to Naval Academy—Actual Bona Fide Residence.**—The words "an actual and bona fide resident of the State, congressional district, or Territory in which the vacancy will exist," employed in the act of June 29, 1906 (34

NAVAL ACADEMY—Continued.

Stat. 578), providing for the nomination of midshipmen for admission to the Naval Academy, require the appointee to be "actually domiciled" in the State where he is appointed. This, however, does not necessarily mean actual physical presence. A naval officer whose home is at Athens, N. Y., but who has for some time past been stationed at Portsmouth, N. H., is a legal resident and voter in Athens, N. Y., which is also the actual bona fide residence of his minor son, notwithstanding the latter has for several years been living with his father and physically present at Portsmouth, N. H. 41.

2. **Same.**—Similarly, the minor son of an Army officer stationed for the last two years at Governors Island, N. Y., who has been physically present and attending school in New York City, is not an actual bona fide resident of the State of New York, but of Virginia, which is the legal residence of his parent, unless he has become entitled to or attempted to establish an actual residence separate and apart from his father. *Ib.*
3. **Appointment of Midshipman at Naval Academy—Revocation.**—A nominee for the office of midshipman in the Navy, whose qualifications have been regularly certified to by a Representative in Congress, who has passed the necessary mental and physical examination and received and accepted the appointment, can not, in the absence of fraud, be deprived of that office, although it should afterwards appear that he was not an actual resident of the congressional district whence he was appointed. 180.
4. **Same—Reexamination.**—The eligibility of the nominee having been determined by a former Secretary of the Navy, that action, in absence of fraud, must be regarded as final and not subject to reexamination under a subsequent administration. *Ib.*
5. **Same.**—A vacancy occurring by reason of the removal of the midshipman could be filled, under the statute (34 Stat. 578), only by the selective appointment of the Secretary of the Navy. *Ib.*
6. **Same—Qualifications.**—A statute which empowers an officer or tribunal to appoint a person having certain qualifications, confers upon that officer or tribunal the power to determine the qualifications and eligibility of the appointee. *Ib.*

NAVAL SUPPLY FUND.

1. **Increase of Permanent Naval Supply Fund—Appropriation for Handling Naval Stores.**—The increase of the permanent naval supply fund beyond the statutory limit of \$2,700,000, by adding to it all the stock technically known as "common general stock," is without warrant of law. 634.
2. **Same.**—The expense of handling stores purchased under the naval supply fund, being specifically provided for in the annual naval appropriation acts, can not be legally charged to the working appropriations. *Ib.*

NAVAL SUPPLY FUND—Continued.

3. **Same.**—The words “accumulated naval supplies” in the act of March 2, 1889 (25 Stat. 817, 818), do not mean stores obtained by the application of balances of specific appropriations unused at the end of the fiscal year to the purchase of articles not to be used in that year, and the transfer of such articles so purchased to the naval supply fund. The words referred to evidently designate supplies intended for use in the current year for which they were purchased and not used because in unanticipated excess of what were needed, or by some other fortuitous event. *Ib.*
4. **Same.**—The intentional acquisition of supplies for consumption or use in succeeding years, by purchases from appropriations for the current fiscal year, is inconsistent with the provisions of the act of March 2, 1889 (25 Stat. 817). *Ib.*
5. **Same.**—Supplies thus purchased should be utilized in advance of stores regularly purchased under the annual appropriation for the current fiscal year, and Congress should be advised of the circumstances of these accumulations. *Ib.*
6. **Same.**—The provisions in the act of June 30, 1890 (26 Stat. 205), as enlarged by the act of March 2, 1891 (26 Stat. 807), with regard to “arranging, classifying, consolidating, and cataloguing supplies for the Navy,” is not to be considered as repealing any of the previous acts regarding the purchase and disposition of naval supplies. *Ib.*
7. **Same.**—The general public system for the appropriation and disbursement of public moneys is permanent, and unless charges are within the objects for which an appropriation is made they can not be applied to that appropriation. *Ib.*

NAVAL VESSELS. See EIGHT-HOUR LAW, 1, 2.

NAVAL WATER BARGE NO. 7. See VESSELS, 1.

NAVIGATION. See HUDSON RIVER.

NAVY.

1. **Boatswain in Navy—Revocation of Warrant.**—The President has no power to revoke the warrant of a boatswain in the Navy and discharge him from the service without the sentence of a court-martial. 325.
2. **Construction of Battleship No. 34—Insufficient Appropriation.**—It would be improper for the Secretary of the Navy to proceed with the construction of battleship No. 34 at the Government navy yard, New York, authorized by the act of June 24, 1910 (36 Stat. 605, 628), it having been ascertained that the vessel can not be completed within the limit of cost fixed by that act. 477.
3. **Court-martial—Discharge Obtained Through Fraud.**—The Secretary of the Navy has authority to revoke the discharge of an apprentice seaman, procured by fraud while a general court-martial prisoner, and may resume jurisdiction over the man.

NAVY—Continued.

In this case the prisoner made a bogus confession, claiming that he had committed a murder for which he was wanted by the civil authorities, and after his discharge repudiated his confession. 170. ¶

4. **Court-martial—Embezzlement—Assistant Paymaster in Navy.**—An assistant paymaster in the Navy charged with the duty of keeping safely money intrusted to his care, who was furnished a safe with combination locks on both the outer and inner doors, for the safe-keeping of this money, and who after removing the lock from the inner door of the safe and failing to lock the outer door, left the vessel knowing the condition of the safe, and as a result a portion of the money was lost, is chargeable with negligence equivalent to a criminal intent and is guilty of embezzlement under the provisions of section 88 of the Penal Code of the United States which went into effect January 1, 1910. 286.
5. **Court-martial—Censure for Misconduct Not a Bar.**—Disapproval of conduct and censure by the Secretary of the Navy of a subordinate officer for misconduct is not such a reprimand, contemplated by section 265 of the Navy Regulations, as will prevent a court-martial proceeding upon the same charge. 622.
6. **Same.**—The reprimand referred to in section 265 of the Navy Regulations is such a reprimand as is administered under the authority of the statutes enacted and regulations adopted for the control of the Navy. *Ib.*
7. **Paymaster's Clerk in the Navy—Status Traveling Home.**—The Attorney General declines to express an opinion upon the question whether a paymaster's clerk in the Navy retains his status as such clerk while traveling home under orders received prior to the revocation of his appointment, for the reason that the question is hypothetical in its nature. 129.
8. **The validity of article 1367 of the Naval Regulations** as applied to cases arising in the future can not properly be considered. *Ib.*
9. **Paymaster's Clerk of the Navy—Retirement.**—A paymaster's clerk of the Navy who is incapacitated for active service and whose incapacity is the result of an incident of the service, is entitled to be retired under the provisions of section 1453, Revised Statutes. 417.
10. **Same.**—Paymasters' clerks, in reference to retirement, are placed in precisely the same condition under the act of June 24, 1910 (36 Stat. 606), as warrant officers. *Ib.*
11. **Naval Officers Serving as Bureau Chiefs—Rank, Pay, and Emoluments.**—A naval officer who served as bureau chief in the Navy Department and is eligible to retirement after 30 years' service in the Navy or Navy Department, is entitled to the rank, pay, and emoluments of a bureau chief under the act of June 24, 1910 (36 Stat. 607), during the time he remains on the active list, whether as bureau chief or otherwise. 429.

NAVY—Continued.

12. **Same.**—The "emoluments" of an office or place include salary, pay, and every kind of pecuniary compensation for service rendered. *Id.*
13. **Naval Officers Serving as Bureau Chiefs—Retirement—Rank and Emoluments.**—A naval officer who has served as chief of bureau in the Navy and has returned to general duty before the expiration of 30 years' service is not entitled, upon becoming eligible for retirement, to the same rank and emoluments to which he would have been entitled under the provisions of the naval appropriation act of June 24, 1910 (36 Stat. 607, 608), if he had become eligible for retirement while still acting as chief of bureau. 531.
14. **Same—Retirement.**—The words "Any officer of the Navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired," found in the third paragraph of the act of May 13, 1908 (35 Stat. 128), refer to the case of retirement during service as chief of bureau. *Id.*
15. **Naval Officers—Rank and of Pay Captain Jefferson F. Moser.**—In the case of a retired naval officer who served as midshipman at the Naval Academy during the Civil War and who secured a judgment in the Court of Claims in which it was held that he was entitled to "three-fourths of the sea pay of the next higher grade" above that held by him at the time of retirement under the act of March 3, 1899 (30 Stat. 1007), wherein it appears that the court failed to take into consideration the act of June 29, 1906 (34 Stat. 554), of similar import—such judgment does not estop the Secretary of War from contesting the officer's claim to be retired with the rank of the next higher grade under the provisions of the latter statute. 352.
16. **Same.**—In a second suit between two parties, where the cause of action is similar to the cause of action in the first suit, the parties are not precluded from contesting the constitutionality or the existence and force of a statute which was not alluded to or brought to the attention of the court in the former suit. *Id.*

APPROPRIATION FOR RAISING THE BATTLESHIP MAINE. *See* BATTLESHIP MAINE.

CONSTRUCTION OF SUBMARINE TORPEDO BOATS. *See* EIGHT-HOUR LAW, 1, 2.

MIDSHIPMEN. *See* NAVAL ACADEMY, 3.

MARINE CORPS A PART OF NAVAL ESTABLISHMENT. *See* MARINE CORPS, 3.

NAVAL SUPPLY FUND. *See also* NAVY SUPPLY FUND.

NAVY DEPARTMENT.

1. **Vacancies in Head of Navy Department and Chiefs of Bureaus—Temporary Appointments of Naval Officers.**—Officers of the Navy designated by the Secretary of the Navy to act in an advisory

NAVY DEPARTMENT—Continued.

capacity to him, but without executive authority over the other bureaus or officers of the Navy Department, can not be legally designated by the President to act as Secretary of the Navy during the absence or sickness of the Secretary or Assistant Secretary. 95.

2. **Same—Rear Admirals, Captains, and Commanders** are not "Other Officers."—Such aids, although as rear admirals and captains and commanders they are officers in the public service of the Government, are not "other officers" in the departments eligible for such temporary appointment under the provisions of section 179, Revised Statutes. *Ib.*
3. **Same.—Officers of the Navy holding commissions issued by the President**, by and with the advice and consent of the Senate, but who do not hold any office in the Navy Department or in a bureau thereof by appointment of the President, can not be legally designated by the President to act as chiefs of bureaus in the absence of the appointed Chiefs of Bureaus of Equipment, Construction and Repair, and Yards and Docks. *Ib.*
4. **Same.—Such an officer, although assigned to act as an assistant to an officer in the department**, did not thereby become an officer in the department within the meaning of section 179, Revised Statutes. *Ib.*
5. **Chief Constructor in the Navy—Grade—Vacancy.**—The resignation of Mr. Washington L. Capps, chief of the Bureau of Construction and Repair in the Navy Department, upon his completion of 30 years' service in the Navy, and his being commissioned, under the provisions of the naval appropriation act of June 24, 1910 (36 Stat. 607, 608), a chief constructor in the Navy, with the rank of rear admiral, did not create a new grade in the construction corps. No vacancy was created thereby in the grade of naval constructor, nor in the total number of naval constructors and assistant constructors provided by law. 526.
6. **Same.—The office of chief of bureau in the Navy Department** is not designated by acts of Congress as a grade. *Ib.*

NAVAL OFFICERS SERVING AS BUREAU CHIEFS. *See* NAVY, 11-14.

NAVY REGULATIONS. *See* NAVY, 5-8.

NAVY-YARD EMPLOYEES. *See* LEAVES OF ABSENCE.

NEW YORK DRY DOCK. *See* DRY DOCK, 1.

NOMINATION.

FOR APPOINTMENT TO NAVAL ACADEMY. *See* NAVAL ACADEMY, 1.

OFFICERS.

OF THE MARINE CORPS. *See* MARINE CORPS.

OF THE NAVY. *See* NAVY.

OF THE UNITED STATES. *See* COMMISSIONERS OF DEEDS; AND REVENUE CUTTER SERVICE, 1, 2.

OFFICIAL BONDS.

1. **Rate of Premium—Bonds Given by Deputy Collectors of Internal Revenue.**—The act of August 5, 1909 (36 Stat. 125), regulating the rate of premium to be paid on official bonds does not apply to bonds voluntarily given by an employee or officer of the United States to a superior officer, and consequently it does not apply to bonds given by deputy collectors of internal revenue to collectors. 28.
2. **Same.**—The act of August 5, 1909, does apply to bonds running to the United States and which are accepted in each case by the properly designated officer of the United States. *Ib.*
3. **Same.**—Voluntary bonds of the character above described do not come within the purview of the act of August 13, 1894 (28 Stat. 279), which prescribes the character and qualification of guarantee companies which may be accepted on official bonds required by law. *Ib.*
4. **Same.**—The rate of premium paid by the incumbent of any particular office during 1908 on his official bond may be used as the base for computing the rate which shall be paid upon the bond of the incumbent of the same office under the act of August 5, 1909, provided such rate did not constitute an isolated instance of an unusual or extortionate premium. *Ib.*

See also SURETY COMPANIES.

OFFICIAL STAMPS.

Sale of old Uncanceled Official Stamps closely resembling postage stamps.—In the absence of statutory authority therefor, public policy forbids the sale of official stamps, uncanceled, which have become obsolete, but which resemble in general appearance ordinary postage stamps. If canceled, the objection would be removed. 201.

PANAMA.

Panama Railroad—Tariff Rates.—In view of the concession contracts between the Panama Railroad Co. and the Republic of Colombia whereby "Colombian products" were to be transported at one-half the established freight rates, and the order of the chairman of the Isthmian Canal Commission dated October 25, 1906, extending the reduced rates to Panamanian products "both of the soil and manufacture," and in view of the construction placed upon the order of the commission by the railroad company, that the provision applies, as to manufactured products, only to such as are made from natural products produced entirely in Panama: *Recommended*, That the order of the commission be restricted to the meaning placed upon it by the railroad company. 564.

PANAMA CANAL.

1. **Purchase of Material and Equipment from Unlawful Trusts.**—A contract for the purchase of material and equipment for use

PANAMA CANAL—Continued.

in the construction of the Panama Canal which, by a joint resolution passed June 25, 1906 (34 Stat. 835), and an Executive order of January 6, 1908, is required to be awarded to the lowest responsible bidder, can not be ignored simply because such bidder has been adjudicated to be a party to an unlawful trust or monopoly. 247.

2. **Same.**—The contracts of a party to an unlawful trust or monopoly for the sale and delivery of merchandise are enforceable under the law, and this is the test of a responsible bidder under the provisions above referred to. *Ib.*

PARTNERSHIP. See CORPORATIONS, 10.

PATENT OFFICE.

Registration in Patent Office of Prints Designed to be Used on Articles of Manufacture.—The copyright act of March 4, 1909 (35 Stat. 1075), did not relieve the Patent Office of its duty, and it is still required to register all prints which have heretofore been registered therein under the act of June 18, 1874 (18 Stat. 78), and in the same manner as they have heretofore been registered. 116.

PATENTS.

1. **Infringement—Cartridge-case Extractor.**—A cartridge-case extractor manufactured in accordance with Letters Patent No. 625326, known as the Driggs and Tasker patent, would not be an infringement upon Letters Patent No. 599482, or Tasker patent. 52.
2. **Same.**—Considering the specifications and first claim of the Tasker patent together, the curvature of the wall of the slot against which the face of the extractor works must be considered as an ingredient part of the combination claimed. The shape of the wall of this slot, and the removable means for normally blocking the openings into the guide grooves mentioned in the fifteenth, sixteenth, and seventeenth claims were new ingredients and patentable, but neither of these claims is present in the Driggs-Tasker extractor. *Ib.*
3. **Same.**—It is elementary patent law that to constitute an infringement of a combination claim, every element of the combination must be present in the infringing patent. *Ib.*

PAYMASTER'S CLERK. See NAVY, 7-10.

PENSION AGENCIES.

Discontinuance of Pension Agencies.—The President is not authorized to discontinue 17 of the 18 agencies for the payment of Federal pensions and direct that work now divided among the 18 to be performed by 1 agency. His power to reduce or consolidate such agencies is limited by the act of March 3, 1891 (26 Stat. 1082), to the reduction or consolidation of such agencies with the three groups directed to be established by that act. 617.

PENSION ATTORNEYS. *See* COMMISSIONERS OF DEEDS.**PENSIONS.**

1. **Honorably Discharged Soldiers and Sailors—Terms of Discharge** are conclusive.—In determining the pensionable status of a person who served in the civil war, under the acts of June 27, 1890 (26 Stat. 182), and of February 6, 1907 (34 Stat. 879), the Department of the Interior is concluded by the terms of a discharge granted by the Navy Department as "honorable." 83.
2. **Same.**—By using the words "honorably discharged" in the acts above referred to, Congress intended to adopt or act upon the actual past discharges as honorable, if of a kind generally so regarded by the War and Navy Departments and military men of the branches in question at the time the separation or discharge took place. *Ib.*
3. **Same.**—In construing these pensions the question to be determined is not what should have been granted, but what was granted. *Ib.*

PERMANENT NAVAL SUPPLY FUND. *See* NAVAL SUPPLY FUND.**PERSONAL RIGHT.**

Whenever there is a peremptory obligation on the part of the Government to do something with reference to a person, there is a corresponding right in that person to have it done. 417.

PHILIPPINE ISLANDS.

1. **Entry of Goods from Philippines.**—Section 14 of the tariff act of August 5, 1909 (36 Stat. 87), which prohibits the importation from foreign countries of goods made in whole or in part by convict labor, does not apply to goods coming into the United States from the Philippine Islands. 422.
2. **Same.**—The Philippine Islands are not a "foreign country" within the meaning of the above-mentioned section. *Ib.*
3. **Disposition of Friar Lands in the Philippines.**—The limitations in section 15 of the act of July 1, 1902 (32 Stat. 696), of the amount of public land which may be acquired by individuals and corporations in the Philippine Islands do not apply to estates purchased by the Philippine Government from religious orders pursuant to the authority of sections 63, 64, and 65 of said act. 103.
4. **Corporations Holding Real Estate.**—Neither a corporation formed in Belgium to acquire and possess lands in the Philippine Islands nor any other foreign or domestic corporation authorized to engage in agriculture may legally purchase or hold more than 1,024 hectares of land in the Philippine Islands. 258.
5. **Philippine Internal-revenue Stamps.**—Funds derived from the sale of internal-revenue stamps in the Philippine Islands belong to the Philippine Government, under the provisions of section 4 of the act of March 8, 1902 (32 Stat. 54), and should be paid into the Philippine treasury. This section remains in full

PHILIPPINE ISLANDS—Continued.

- force and effect notwithstanding the provisions of section 5 of the tariff act of August 5, 1909 (36 Stat. 84, 85). 70.
6. **Transfer of Lands Reserved for Naval Purposes to War Department.**—The President has authority to transfer the use and control of lands in the Philippine Islands, reserved by Executive order for naval purposes, to the War Department for military purposes. 262.
 7. **Same.**—Opinion of November 3, 1904 (25 Op. 269), approved. *Ib.*
 8. **Homicide Committed on Hospital Ship Stationed at Olongapo, P. I.—Jurisdiction.**—A homicide committed on board of the hospital ship Relief while stationed at Olongapo, P. I., by the acting master of the vessel, who committed this act by order of the commanding officer of the ship, occurred "out of the jurisdiction of any particular State or district," within the meaning of section 730, Revised Statutes, and the parties accused may be tried in any judicial district either in a State or a Territory of the United States into which they shall be first brought. 24.
 9. **Same.**—The word "district" as used in section 730, Revised Statutes, includes every Territory within which there are courts regularly organized and having jurisdiction over offenses against the United States; that is, such courts as are mentioned in section 1910, Revised Statutes. *Ib.*
 10. **Same.**—The courts of the Philippine Islands are not vested with jurisdiction in cases arising under the Constitution and laws of the United States, as prescribed by section 1910, Revised Statutes. *Ib.*

PORTO RICO.

1. **Legality of Bond Issue.**—The issuance of bonds by the insular government of Porto Rico for the purpose of constructing roads and bridges, as provided by an act of the Legislative Assembly of Porto Rico, approved March 10, 1910, not being in excess of 7 per cent of the aggregate tax valuation of its property, is legal. 245.
2. **United States District Court, Porto Rico—Signing Bill of Exceptions.**—Where the United States district judge for the district of Porto Rico left the jurisdiction before signing a bill of exceptions, he should return to Porto Rico and sign it; but in case that can not be done, the bill of exceptions should be prepared and agreed upon by counsel on both sides, and counsel should stipulate that it is correct and that the judge may allow and sign the same outside of his district. 321.
3. **American Railroad Co. of Porto Rico—Assignment to—Exemption from taxation.**—The Legislative Assembly of Porto Rico did not exceed its powers in granting to the "Compañía de los Ferrocarriles de Puerto Rico," in an act passed February 4.

PORTO RICO—Continued.

1902, an exemption from taxation upon its railroad lines and property theretofore built and acquired by it, as well as the railroad lines and property thereafter to be built and acquired by it. 491.

4. **Same.**—The exemption applies only to those lines and property which were the possession of that company, and was not assignable. Consequently it does not apply to railroad lines or property built or acquired by subsequent purchasers, lessees, or operators. *Ib.*
5. **Same.**—The exemption does not extend to the "American Railroad Co. of Porto Rico, Central Aguirre, operator," to which company the Compañía de los Ferrocarriles leased all its property, notwithstanding the fact that the executive council on July 22, 1902, by an ordinance, authorized the latter company to assign to the American Railroad Co. the right to construct, maintain, and operate the railroad line from Ponce to Guayama, the building of which had been authorized by ordinance of the executive council on October 28, 1901, and notwithstanding the ordinance of assignment was afterwards approved by the President. *Ib.*
6. **Same.**—Immunity from taxation must be construed most strongly against the grantee and will not be held assignable in order to pass to a purchaser on a sale, under mortgage or otherwise, without express authorization. *Ib.*

POTOMAC RIVER, D. C.

1. **Title to Made Land—Riparian Rights.**—The United States is the owner of the submerged land and also the bed of the navigable portion of Potomac River within the original limits of the District of Columbia. 366.
2. **Same—Property of the United States.**—The submerged area along the water front of the Potomac River just below Alexandria, Va., if filled with material dredged from the river, will remain the property of the United States up to the present high-water mark. *Ib.*

PRACTICE. See NAVY, 16.

PREFERENCE. See CIVIL SERVICE, 1.

PRESENTS. See ACCEPTANCE OF PRESENTS.

PRESIDENT.

DESIGNATION OF OFFICERS OF THE NAVY TO ACT AS BUREAU CHIEFS. See NAVY DEPARTMENT, 3.

DISCONTINUANCE OF PENSION AGENCIES. See also PENSION AGENCIES.

PROCLAMATION. See COPYRIGHT LAW, 15-17; FOREST RESERVES, 3, 4.

POWER TO DETAIL OFFICERS OF THE ENGINEER CORPS. See ARMY, 1-3.

POWER TO REVOKE WARRANT OF A BOATSWAIN. See NAVY, 1.

PRESIDENT—Continued.

POWER TO SUSPEND PAYMENT OF TONNAGE TAX. *See* TONNAGE DUTIES, 1-3.

REMOVAL OF DRY DOCK AT ALGIERS, LA. *See* DRY DOCK, 6.

STATE TAX ON PRESIDENT'S AUTOMOBILE. *See* STATE TAX.

TRANSFER CAMP HANCOCK TO WAR DEPARTMENT. *See* CAMP HANCOCK.

TRANSFER OF LANDS RESERVED FOR NAVAL PURPOSES TO WAR DEPARTMENT. *See* PHILIPPINE ISLANDS, 6.

PRISONERS. *See* FEDERAL PRISONERS.

PROCESS AGENTS. *See* BONDS, 2.

PROCLAMATION. *See* COPYRIGHT LAW, 15-17; FOREST RESERVES, 3-4.

PUBLIC LANDS. *See* ALASKA, 3; AND FOREST RESERVES.

PUBLIC PRINTER.

1. **Abolition of Branch Printing Offices.**—The Public Printer can not, of his own motion, abolish any branch printing office, nor can he, with the consent of the Joint Committee on Printing, abolish any branch printing offices other than the excepted offices enumerated in section 31 of the act of January 12, 1895 (28 Stat. 601). 232.
2. **Same.**—The Public Printer can not discontinue the operation of the branch printing offices as branch offices, except the specific offices mentioned in the proviso of section 31 of the general printing act of January 12, 1895 (28 Stat. 605), to wit, those in the Weather Bureau and the Record and Pension Division of the War Department, even though he transfers the employees and plants thereof, either in whole or in part, to the Government Printing Office Building, and there continues the work hitherto performed in the branch offices. 601.
3. **Purchase of the Product of Bindery Operations.**—Sections 4 and 5 of the act of June 17, 1910 (36 Stat. 531), relating to the purchase of stationery and other miscellaneous supplies for the executive departments and other Government establishments in Washington do not supersede or repeal section 87 of the act of July 12, 1895 (28 Stat. 622), and other provisions of law under which it is claimed the Public Printer has authority to purchase all articles that are manifestly products of the printing art and its kindred operations. 581.
4. **Same.**—Blank books, press copy books, stenographers' note-books, etc., which have been scheduled by the general supply committee, and are of a staple character usually carried in stock by commercial houses, do not come within the terms of section 87 of the act of January 12, 1895, which requires only that "printing, binding, and blank books," which it is necessary to have specially executed, manufactured, or made at the Government Printing Office, shall be "done" there, except as otherwise provided by law. *Ib.*

PUBLIC PRINTER—Continued.

5. **Same.—Articles for other departments of the Government.**—The Public Printer is, however, required to purchase from the schedule of the general supply committee any of the articles above referred to which are properly upon the schedule, where the same are required for the use of the Printing Office, but he is not required to purchase such articles from the schedule for the other departments or establishments of the Government, as they would be ordered through the Secretary of the Treasury. *Ib.*
6. **Same.—A specifically described patented binding device.**—The Public Printer is not required by law to supply a specifically described patented binding device on the requisition of an allottee of the appropriation for public printing and binding, the article being of a character required by section 87 of the act of July 12, 1895, to be "done" at the Government Printing Office, where in his opinion an article of different character is more in the interest of economy, uniformity, and better adapted to the needs of the service. *Ib.*
7. **Purchase of Supplies Not Listed—Head of Department Not Required to State Specific Reasons.**—In purchasing articles of supplies not listed in the schedule of the general supply committee, or contracted for by the Secretary of the Treasury, the head of a department making the requisition is not required to state the specific reasons why such articles are necessary in lieu of other articles of a more or less similar nature which are listed on the schedule. Nor is the head of a department required to submit a similar statement in making a requisition upon the Public Printer for an article within the description of articles enumerated in the act of June 28, 1902 (32 Stat. 481), but which is not required to be made to order, or "done," at the Government Printing Office under the provisions of section 87 of the act of January 12, 1895 (28 Stat. 622). 612.
8. **Same.—The discretion to be exercised by the Public Printer** under section 87 of the act of January 12, 1895, extends only to articles of a character which are to be "done," that is, "executed, manufactured, or made," at the Government Printing Office. *Ib.*
9. **Same.—The fact that a similar article is listed upon the general supply committee's schedule** authorized by section 4 of the act of June 17, 1910 (36 Stat. 531), which might possibly subserve the purpose desired, is a matter that concerns only the head of the department making the requisition. *Ib.*

PURCHASE OF SUPPLIES.

1. **Detached bureaus or offices having a field or outlying service** may, by permission of the head of the department, under section 4 of the act of June 17, 1910 (36 Stat. 531), order all their supplies directly from the contractor, whether needed for use in the city of Washington or elsewhere. 380.

PURCHASE OF SUPPLIES—Continued.

2. **Same.**—The word “him” in the last proviso of the above section refers to the Secretary of the Treasury, and the word “so” refers to the method of contracting for other supplies, which method is to be followed in contracting for telephone, electric light, and power service. *Ib.*
3. **Same.**—Section 4 of the act of June 17, 1910 (36 Stat. 531), supercedes the acts of January 27, 1894, and April 21, 1894 (28 Stat. 33 and 62), and prescribes the method by which the supplies mentioned therein should be purchased. *Ib.*
4. **Same.**—The Bureau of Engraving and Printing is subject to the provisions of section 4 of the act of 1894, and supplies for that bureau, of the character mentioned in that act, must be contracted for and purchased in accordance with its terms. *Ib.*
5. **Purchase of Supplies for the Executive Departments—Secretary of the Treasury.**—Section 4 of the act of June 17, 1910 (36 Stat. 531), does not make it mandatory upon the Secretary of the Treasury to purchase all supplies required by the several executive departments, of the character named in that act, regardless of whether, as prescribed by the first proviso thereof, such articles are “in common use by or suitable to the ordinary needs of two or more such departments or establishments.” 573.
6. **Same.**—The power given the Secretary to add other articles to the common supply schedule is discretionary. If he does not choose to exercise the power and add to it after his attention is called to the matter, then the department or establishment concerned may purchase the article in the manner theretofore authorized by law; but if he does add it to the schedule, it must be purchased through the general supply committee. *Ib.*
7. **Same.**—The repealing clause, section 5, of the act of June 17, 1910 (36 Stat. 531), amended and modified the act of April 28, 1904 (33 Stat. 440), which creates the office of purchasing agent in the Post Office Department, only in so far as the latter is inconsistent with the former. *Ib.*
8. **Same—Secretary may Amend the Annual Common Supply Schedule.**—The Secretary of the Treasury has authority under section 4 of the act of 1910 to amend the annual common supply schedule by adding other articles of the character covered by the act at any time during the year that he may deem proper. *Ib.*
9. **Same.**—Telephone, electric light, and power service purchased or contracted for from companies or individuals should be obtained through the general supply committee. *Ib.*
10. **Same.**—The provision that “no department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau” does not limit the number of supply bureaus or offices in the several departments and establishments. *Ib.*

PURCHASE OF SUPPLIES—Continued.

11. **Purchase of Supplies from Party to an Unlawful Trust.**—An adjudication that a person or corporation is a party to an unlawful trust or monopoly, from which decree an appeal has been taken, is not sufficient to exclude such person or corporation from competition in the sale of supplies to the Government. Opinion of April 19, 1910 (23 Op. 247), followed. 334.
12. **Same.**—Statutory authority "to reject any and all bids" does not confer the right to arbitrarily or capriciously reject any bid. *Ib.*
13. **Same.**—A statutory provision that supplies shall be purchased where they can be cheapest, etc., "the interests of the Government considered," does not enlarge the authority of the contracting officer, but has reference to the cost and adaptability of the supplies. *Ib.*

See also DISTRICT OF COLUMBIA, 4, 5; PUBLIC PRINTER, 3-9.

PURE FOOD.

1. **Canadian Club Whisky—Label—Blend.**—"Canadian Club Whisky," which is the name of a whisky composed of two separate and distinct distillates of grain, is such a distinctive name and is so arbitrary and fanciful as to clearly distinguish it from all other whisky or similar product and need not be labeled "a blend of whiskies" under the provisions of section 8 of the food and drugs act of June 30, 1906 (34 Stat. 768). 455.
2. **Same.**—A "distinctive name," within the meaning of section 8 (34 Stat. 768), is not limited to designations that are purely arbitrary or fanciful and which do not contain the names of the elements of which the compound is composed. *Ib.*

See also MEAT INSPECTION.

RAILROADS. *See* COMMON CARRIERS; PANAMA.

RANK, PAY, AND EMOLUMENTS. *See* NAVY, 11-15.

RATE OF PREMIUM. *See* OFFICIAL BONDS.

RECLAMATION.

OF ALCOHOL FROM STAVES OF EMPTY BARRELS. *See* INTERNAL REVENUE, 2.

RECLAMATION SERVICE.

Filing of contracts.—Contracts authorized by the Secretary of the Interior, which were entered into between an acting supervising engineer in the United States Reclamation Service and certain users of water furnished for irrigation purposes by the Reclamation Service, are within the purview of section 3744, Revised Statutes, and copies thereof should be filed in the returns office of the Department of the Interior by the officer making and signing the same. 66.

RECORD.

OF SPECIAL TAXES. *See* INTERNAL REVENUE, 1.

REFUND. *See* TONNAGE DUTIES, 4.

REGISTRATION. See COPYRIGHT LAW, 7-14; AND PATENT OFFICE.

REMISSION OF FINES, PENALTIES, AND FORFEITURES. See TONNAGE DUTIES, 5.

RENEWALS. See COPYRIGHTS, 5.

REPRIMAND. See NAVY, 6.

RESIDENCE. See NAVAL ACADEMY, 1, 2.

RETIREMENT. See NAVY, 9, 10, 15.

REVENUE-CUTTER SERVICE.

1. Enlisted men of the Revenue-Cutter Service are not "officers of the Government" within the meaning of the act of March 2, 1907 (34 Stat. 1170), which provides that no part of that appropriation shall be applied to the payment of the expenses of using transports in any other Government work than the transportation of the Army and its supplies and officers and enlisted men, etc., of the Marine Corps, etc. 320.
2. Same.—Enlisted men are never called officers in any branch of the Government service except where they are appointed as noncommissioned or petty officers in the Army or Navy. The terms "officers" and "enlisted men" are used in contradistinction, neither referring to the other. *Ib.*
3. Interment of Officers and Seamen in National Cemeteries.—Commissioned and warrant officers and seamen of the Revenue-Cutter Service who die in the ordinary administration of that service in time of peace are not entitled to the privilege of interment in national cemeteries. 543.

RIPARIAN RIGHTS. See POTOMAC RIVER, 1.

ROADS. See MOUND CITY NATIONAL CEMETERY.

SALE. See OFFICIAL STAMPS.

SAULT STE. MARIE BRIDGE CO. See BRIDGES, 1.

SECRETARY OF AGRICULTURE. See ALASKA, 1; MEAT INSPECTION, 6.

SECRETARY OF THE NAVY. See DRY DOCK, 1; NAVAL ACADEMY, 5; NAVY, 2, 3; VESSELS, 1.

SECRETARY OF THE TREASURY.

1. Marking of Imported Liquors—Enforcement of section 240 of the Criminal Code.—It is not within the province of the Secretary of the Treasury to prescribe regulations governing the marking of imported liquors to conform to section 240 of the Criminal Code adopted by the act of March 4, 1909 (35 Stat. 1088). 99.
2. Same—No Authority to Formulate Rules and Regulations to Enforce that Statute.—That section is a criminal statute, with no reference to the collection of internal revenue or duties on imports, and there is no statute authorizing the Secretary of the Treasury to formulate rules and regulations for the enforcement of a general criminal statute which has no relation to the collection of revenue. *Ib.*

SECRETARY OF THE TREASURY—Continued.

3. *Same.*—The Treasury Department may, however, instruct collectors of customs that when a package, shipped from a foreign country or a place subject to the jurisdiction of the United States, but noncontiguous thereto, into the United States, containing intoxicating liquors, and clearly not labeled as required by that section, comes within the observation of a customs officer, he should seize the same and have it declared forfeited by like proceedings as those provided to enforce forfeitures for violation of the customs laws. *Ib.*

See also AWARD, 1; CONTRACTS, 3; PURCHASE OF SUPPLIES, 5, 6, 8.

SECRETARY OF WAR. *See* BRIDGES, 4; NAVY, 15; VESSELS, 5.

SOLDIERS AND SAILORS. *See* CIVIL SERVICE, 1; PENSIONS, 1-3.

SPANISH TREATY CLAIMS.

Claims of Spanish Subjects Residing in Florida, under Treaty of 1819.—The Attorney General reviews claims of Spanish subjects residing in Florida arising under the provisions of the treaty of 1819 with Spain, but declines to express an opinion upon the merits of said claims for the reason that all open questions have been settled by uniform rulings of the administrative officers of the Government and the matter has been repeatedly passed upon by his predecessors in office. 306.

STAMPS. *See* OFFICIAL STAMPS.

STATE TAX.

1. **State Tax on Automobiles Purchased for President.**—Automobiles purchased for the President under appropriations made by Congress are not subject to taxation by a State, nor can the chauffeurs operating said machines be taxed by a State for the privileges of performing the duties pertaining to their employment. 604.
2. *Same.*—**May Impose Certain Fees.**—A State may, however, in order to protect the public against dangers that might arise from performing the duties of a lawful employment in an unlawful manner, adopt reasonable police regulations which require that certain conditions be complied with before entering upon such occupation, and the fees intended merely to pay the expenses of complying with these requirements may be exacted. *Ib.*

STATE, WAR, AND NAVY BUILDING.

Certification to Certain Positions Connected with the State, War, and Navy Building.—Executive order of July 5, 1906, which directs the certification next after the eligibles entitled to preference under section 1754, Revised Statutes, of persons honorably discharged from the United States Navy as water tenders, oilers, and firemen, for the position of fireman in the State, War, and Navy Building; persons honorably discharged as warrant machinists in the Navy for the position of chief engineer or assistant engineer; and persons honorably discharged

STATE, WAR, AND NAVY BUILDING—Continued.

as noncommissioned officers in the United States Army for the position of watchman in that building, is inconsistent with the provisions of the civil-service act, and therefore without sanction of law. 112.

STATUARY HALL. *See* CAPITOL, THE.

STATUTORY AUTHORITY. *See* GOVERNMENT.

STATUTORY CONSTRUCTION.

1. Where there are two acts upon the same subject they must stand together if possible, but if they are repugnant in any of their provisions the later act operates as a repeal of the earlier only so far as its provisions are repugnant to the provisions of the earlier act. 70.
2. A construction of a statute which would go beyond the evil intended to be remedied and produce apparently unforeseen and untoward results should be avoided. 78.
3. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It is always presumed that the legislature intended exceptions to its language which would avoid such results. 158.
4. Immunity from taxation must be construed most strongly against the grantee and will not be held assignable in order to pass to a purchaser on a sale, under mortgage, or otherwise without express authorization. 491.
5. Syntax and grammar must yield to the intention of Congress. 537.

STEAMER JOHN B. KETCHAM, 2d. *See* VESSELS, 2.

SUGAR. *See* AWARD.

SUPPLIES. *See* CONTRACTS, 1, 3; PURCHASE OF SUPPLIES.

SURETY COMPANIES.

Globe Surety Co., of Kansas City—Certification as an accepted sole surety.—The Globe Surety Co., of Kansas City, Mo., having the power to guarantee the fidelity of persons holding positions of public or private trust and the power to execute and guarantee bonds and undertakings in judicial proceedings, possesses appropriate corporate powers to entitle it to certification as a sole surety under the provisions of the acts of Congress of August 13, 1894 (28 Stat. 279), and of March 23, 1910 (36 Stat. 241). 411.

See also BONDS, 1-5; OFFICIAL BONDS, 1-4.

TARIFF RATES.

PANAMA RAILROAD. *See* PANAMA.

TAXES.

CORPORATION TAXES. *See* CORPORATIONS, 1-16.

EXEMPTION FROM TAXATION. *See* PORTO RICO, 3-6.

FORM OF RECORD OF SPECIAL TAXES. *See* INTERNAL REVENUE, 1.

STATE TAX ON PRESIDENT'S AUTOMOBILE. *See* STATE TAX.

TEMPORARY FILLING OF VACANCY. *See* MARINE CORPS, 4-6;
NAVY DEPARTMENT, 1, 2.

TEMPORARY FOREST RESERVES. *See* FOREST RESERVES, 1, 2.

TEN-MILLION-POUND TESTING MACHINE.

1. **Transfer to Bureau of Standards.**—Certain equipment, among which is a 10,000,000-pound testing machine, which was purchased by the Department of the Interior for investigating structural materials, is the property of the United States, and under existing law can not be transferred to the Bureau of Mines, but should be transferred to the Bureau of Standards of the Department of Commerce and Labor in order that it may be applied to the specific purpose for which it was authorized. 549.

TITLE. *See* DISTRICT OF COLUMBIA, 2; POTOMAC RIVER, 1, 2; MINE RESCUE WORK, 4, 6.

TONNAGE DUTIES.

1. **President's Power to Suspend Collection.**—The President has no power under any circumstances to suspend collection of the tonnage duties imposed by section 36 of the tariff act of August 5, 1909 (36 Stat. 111), in favor of vessels entering ports of the United States from the Province of Ontario or from any other foreign country. 1.
2. **Same.**—The repeal of section 11 of the act of June 19, 1886 (24 Stat. 81), by section 36 of the act of August 5, 1909 (36 Stat. 111), abrogated the provisions concerning the President's power of suspending tonnage duties which had been transferred from section 14 of the act of June 26, 1884 (23 Stat. 57), to section 21 of the act of 1886. *Ib.*
3. **Same.**—Section 14 of the act of 1884, regarding suspensions of tonnage duties was not repealed by section 11 of the act of 1886, but was merged into section 21 of the latter act. *Ib.*
4. **Refund—Charges Improperly or Erroneously Collected on foreign-built yachts and vessels not used for trade.**—All charges improperly or excessively imposed and erroneously or illegally collected on foreign-built yachts, pleasure boats, and vessels not used or intended to be used for trade, under section 37 of the act of August 5, 1909 (36 Stat. 112), may be refunded under the provisions of section 26 of the act of June 26, 1884 (23 Stat. 59). 21.
5. **Same.**—Section 26 of the act of June 26, 1884, in regard to remission of fines, penalties, and forfeitures, and section 3 of the act of July 5, 1884 (23 Stat. 119), imposing upon the Commissioner of Navigation the supervision of the laws relating to the admeasurement of vessels and the interpretation of all questions relating to the collection of tonnage taxes and the refund of such taxes, are still in force. *Ib.*
6. **Same.**—Should the provision of section 37 of the act of August 5, 1909, imposing a duty of \$7 per gross ton on the vessels therein

TONNAGE DUTIES—Continued.

named be declared invalid, such duty would be an improper or illegal charge within the meaning of the acts of June 26, 1884, and July 5, 1884, and if collected should be refunded. *Ib.*

7. **Coasting and Foreign Trade, Great Lakes.**—The steamer *H. S. Holden*, enrolled and licensed under section 4318 of Revised Statutes for the coasting or foreign trade, which cleared Cleveland, Ohio, for Two Harbors, Mich., without cargo or passengers from Cleveland to Two Harbors, but with cargo from Cleveland to the intermediate port of Fort William, Canada, which cargo she discharged at the latter place, and then proceeded to Two Harbors, is within the provisions of section 2793 of the Revised Statutes, and is not amenable to the tonnage tax imposed by section 36 of the act of August 5, 1909 (36 Stat. 111). 277.

TORPEDO BOATS. See EIGHT-HOUR LAW, 2.

TORPEDOES. See CUSTOMS LAW, 1.

TRANSPORTATION.

OF LETTERS. See COMMON CARRIERS.

TRUSTS OR MONOPOLIES. See PANAMA CANAL; PURCHASE OF SUPPLIES, 11.

UNITED STATES.

COMPENSATION OF EMPLOYEES CONTRACTING DISEASE IN COURSE OF EMPLOYMENT. See EMPLOYEES OF THE UNITED STATES.

RIGHT TO USE DRY DOCK OF SKINNER SHIP BUILDING CO. See DRY DOCK, 3-5.

VACANCY. See MARINE CORPS, 4-6; NAVY DEPARTMENT, 1-5.

VESSELS.

1. **Naval Water Barge No. 7—Disposal of Engine, Boiler, and Hull.**—The Secretary of the Navy may legally remove the engine and boiler from naval barge No. 7, for future use by the Government, since the vessel has been found unfit for further service, and the highest bid received for the vessel was much less than the value of the engine and boiler. The hull, being valueless, may be sunk or destroyed. 470.
2. **Steamer John B. Ketcham 2d—Removal from Channel—Abandonment—Forfeiture.**—Where a steamer (the *John B. Ketcham 2d*) ran into a bank at the entrance to the West Neebish Channel, so as to completely obstruct navigation between the Lakes Superior and Huron, and the engineer officer of the Government thereupon took immediate possession of the vessel under section 20 of the river and harbor act of March 3, 1899 (30 Stat. 1154), and employed a wrecking company to swing it from the channel, said vessel, upon the failure of the owners thereof to pay for this service, may be regarded as having been abandoned and forfeited to the United States. 626.

VESSELS—Continued.

3. **Same—Claim of Wrecking Company—Vessel must be brought within jurisdiction of United States.**—The subsequent action of the wrecking company in raising the vessel and removing it from the jurisdiction of the United States, and in refusing to turn it over to the War Department, thus placing it beyond the power of the United States to enforce its lien, may not relieve the Government of its responsibility to that company for the expense incurred by it in removing the vessel from the channel, but it would seem to justify the Government in refusing to pay such claim unless the vessel is brought within the jurisdiction of the United States, so that it may be attached and sold for the benefit of all claimants, including the United States, according to their respective rights and priorities. *Ib.*
4. **Same.—The liens acquired by the wrecking company upon the vessel, by virtue of the services rendered by it in raising the vessel and towing it into port, are superior to that which the United States would have if it paid the company for removing the vessel from the channel.** *Ib.*
5. **Same.—The authority of the Secretary of War under section 20 of the act of March 3, 1899 (30 Stat. 1154), to pay the claims of the wrecking company, other than for the expenses incurred in removing the vessel from the channel, doubted.** *Ib.*
6. **Coastwise Carrying Trade—Foreign vessel taking tourists around the world and landing at different port.**—Tourists taken on board the German steamship *Cleveland* at New York, carried around the world and landed at San Francisco, are not transported and landed in violation of section 8 of the act of June 19, 1886 (24 Stat. 81), as amended by the act of February 17, 1898 (30 Stat. 248). 204.

WAR DEPARTMENT.

TRANSFER OF LAND TO. *See* PHILIPPINE ISLANDS, 6.

TRANSFER OF CAMP HANCOCK TO DEPARTMENT OF AGRICULTURE.
See CAMP HANCOCK.

SPECIFIC PERFORMANCE OF CONTRACT, WAIVER BECAUSE OF INCREASED TARIFF DUTIES. *See* CONTRACTS, 5, 6.

WHISKY. *See* PURE FOOD.

WHITEHEAD TORPEDOES. *See* CUSTOMS LAW, 1.

WIFE. *See* CITIZENSHIP.

WITNESSES.

1. **Expert witnesses for the Government in cases arising under the food and drugs act are not "employees" as the term is used in the agricultural appropriation act of March 4, 1907 (34 Stat. 1280), or in section 2687, Revised Statutes.** 75.
2. **Same.—The word "employee" as thus used does not embrace persons whose services have been contracted for in connection with a particular case in court, and whose employment has no degree of permanence.** *Ib.*

WORDS AND PHRASES.

1. **"Accumulated Naval Supplies."**—The words "accumulated naval supplies" in the act of March 2, 1889 (25 Stat. 817, 818), do not mean stores obtained by the application of balances of specific appropriations unused at the end of the fiscal year to the purchase of articles not to be used in that year, and the transfer of such articles so purchased to the naval supply fund. The words referred to evidently designate supplies intended for use in the current year for which they were purchased and not used because in unanticipated excess of what were needed, or by some other fortuitous event. 634.
2. **"All employees of the Census Office."**—The expression "All employees of the Census Office," in section 10 of the census act of March 2, 1902 (32 Stat. 53), does not relate to enumerators or interpreters. 227.
3. **"Any officer of the Navy," etc.**—The words "Any officer of the Navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired," found in the third paragraph of the act of May 13, 1908 (35 Stat. 128), refer to the case of retirement during service as chief of bureau. 531.
4. **"Book."**—The word "book," as used in sections 21 and 22 and in class (a) of section 5 and elsewhere in the act of March 4, 1909 (35 Stat. 1080), means the entire book and not a fragment thereof. 176.
5. **"Canadian Club Whisky,"** which is the name of a whisky composed of two separate and distinct distillates of grain, is such a distinctive name and is so arbitrary and fanciful as to clearly distinguish it from all other whisky or similar product and need not be labeled "a blend of whiskies" under the provisions of section 8 of the food and drugs act of June 30, 1906 (34 Stat. 768). 455.
6. **"Current business,"** within the meaning of section 184 of the Criminal Code, is presumably any business of the carrier when it comes up in such a way as to call for current communication. 537.
7. **"Distinctive name."**—A "distinctive name," within the meaning of section 8 (34 Stat. 768), is not limited to designations that are purely arbitrary or fanciful and which do not contain the names of the elements of which the compound is composed. 455.
8. **"Emoluments."**—The "emoluments" of an office or place include salary, pay, and every kind of pecuniary compensation for service rendered. 429.
9. **"Employee."**—The word "employee," as used in the agricultural appropriation act of March 4, 1907 (34 Stat. 1280), or in section 2687, Revised Statutes, does not embrace persons whose services have been contracted for in connection with a particular case in court and whose employment has no degree of permanence. 75.

WORDS AND PHRASES—Continued.

10. **Enlisted men** are never called officers in any branch of the Government service except where they are appointed as noncommissioned or petty officers in the Army or Navy. The terms "officers" and "enlisted men" are used in contradistinction, neither referring to the other. 320.
11. **From any State or Territory.**—The phrase "from any State or Territory" in the proviso of section 7 of the census act of July 2, 1909 (36 Stat. 3), refers to applications where it is requisite that the applicant should be of a particular State or Territory and charged to it under the law of apportionment, which is the case only with respect to appointments in the classified service in the departments at Washington and in the Census Bureau. 78.
12. **"Him."**—The word "him" in the last proviso of section 4 of the act of June 17, 1911 (36 Stat. 531), refers to the Secretary of the Treasury, and the word "so" refers to the method of contracting for other supplies, which method is to be followed in contracting for telephone, electric light, and power service. 380.
13. **"Honorably discharged."**—By using the words "honorably discharged," in the acts of June 27, 1890 (26 Stat. 182), and of February 6, 1907 (34 Stat. 879), Congress intended to adopt or act upon the actual past discharges as honorable, if of a kind generally so regarded by the War and Navy Departments and military men of the branches in question at the time the separation or discharge took place. 83.
14. **"Importation."**—The word "importation," as used in the customs laws, is the bringing of goods into the ports of the United States for the purpose of introducing them into the commerce of the country. 173.
15. **"Imported."**—The word "imported," in tariff laws, refers to merchandise entering the United States from foreign countries, and is never used with reference to shipments from domestic territory. 422.
16. **"Injury."**—The word "injury," as used in the act of May 30, 1908 (35 Stat. 556), is in no sense suggestive of disease, nor has it ordinarily any such significance. 254.
17. **"Laws of a State."**—By the expression "laws of a State," as used in statutes, reference may be had to the common law as well as to the statutory law of such State. 234.
18. **"Meat food product."**—The language of the meat-inspection law indicates that the term "meat food product" does not merely embrace a food which consists wholly of the meat of an animal. 369.
19. **"Meat food product."**—The definition of a "meat food product" as given by the Secretary of Agriculture in Regulation 3, section 8, to wit, "Any article of food intended for human use which is derived or prepared in whole or in part from any edible portion of the carcass of cattle, sheep, swine, or goats, if the said edible

WORDS AND PHRASES—Continued.

- portion so used is a considerable and definite portion of the finished food product," is valid. 369.
20. **"No department or establishment shall purchase or draw supplies," etc.**—The provision that "no department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau" contained in section 4 of the act of June 17, 1910 (36 Stat. 468, 531), does not limit the number of supply bureaus or offices in the several departments and establishments. 573.
21. **"Officers."**—See **"ENLISTED MEN."**
22. **"Produced."**—A book is "produced" within the meaning of section 31 of the copyright act of March 4, 1909 (35 Stat. 1082), when it is printed and bound. Its manufacture is then completed and it becomes entitled to all the protection offered by the copyright laws. 209.
23. **"Similar establishments."**—The term "similar establishments" as used in the meat-inspection law was intended to include all establishments, which are not specifically mentioned, in which the animal is slaughtered, or the carcass or meat is prepared, or in which the meat food product is manufactured. 369.
24. **"So."** See **"HIM."**
25. **"Work of art."**—The meaning of the term "work of art" and its application to a particular design, drawing, or painting, etc., under section 11 of the act of March 4, 1909 (35 Stat. 1078), does not present a question of law, but one of fact, to be determined in each instance by the Register of Copyrights. 557.

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